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A PROPOSAL TO RESTRUCTURE THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY DETERMINATION PROCESS

Y 4.W 36:103-81

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HEARING BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY OF THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES ONE HUNDRED THIRD CONGRESS SECOND SESSION

APRIL 14, 1994

Serial 103-81

Printed for the use of the Committee on Ways and Means



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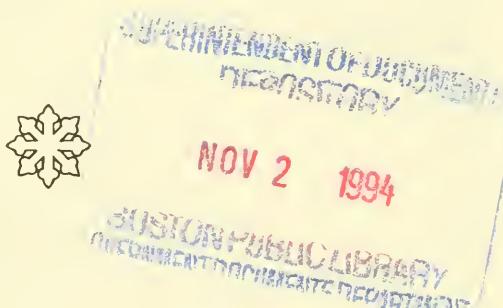
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A PROPOSAL TO RESTRUCTURE THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY DETERMINATION PROCESS

THURSDAY, APRIL 14, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room B-318, Rayburn House Office Building, Hon. Andy Jacobs, Jr. (chairman of the subcommittee) presiding.

[The press releases announcing the hearing follow:]

(1)

FOR IMMEDIATE RELEASE
THURSDAY, MARCH 17, 1994

PRESS RELEASE #13
SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

THE HONORABLE ANDY JACOBS, JR. (D., IND.), CHAIRMAN,
SUBCOMMITTEE ON SOCIAL SECURITY,
COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES,
ANNOUNCES A HEARING ON A PROPOSAL
TO RESTRUCTURE THE SOCIAL SECURITY ADMINISTRATION'S
DISABILITY DETERMINATION PROCESS

The Honorable Andy Jacobs, Jr. (D., Ind.), Chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, announced today that the Subcommittee will hold a hearing on a proposal by the Social Security Administration's (SSA's) Disability Reengineering Team to restructure the process by which SSA considers applications for Disability Insurance (DI) and Supplemental Security Income (SSI) disability benefits. This Team's proposal will be released by SSA on April 1, 1994. The date and time of the Subcommittee hearing will be announced in a separate release shortly thereafter.

BACKGROUND:

The backlog of disability applications awaiting action by SSA has grown sharply in recent years, subjecting qualified claimants to long waits for benefits. The cause of this problem is two-fold. First, during the mid-1980s, the Reagan and Bush Administrations reduced SSA's staff by 21 percent. While these Administrations contended that SSA could compensate for the cuts with increased reliance on technology, automation of the agency's disability determination process has produced limited gains in efficiency to date. Second, applications for DI and SSI disability benefits have increased markedly since 1990. As a result of these two factors, SSA now confronts sharply increased disability claims with neither the technology nor staff resources required to provide timely service.

FOCUS OF THE HEARING:

The Clinton Administration is attempting to address this problem by applying the private-sector concept of "reengineering" to SSA's disability processing systems. By undertaking a radical redesign of these systems, the Administration hopes to achieve large gains in efficiency, thus freeing additional resources to process SSA's growing backlog of applications. Last October, SSA constituted a Disability Reengineering Team to develop a reengineering plan. The Team's proposal will be released by SSA for public comment on April 1, 1994.

The Subcommittee is interested in assessing the impact of this proposal on several key aspects of SSA's service to the public. These include:

- * the length of time that applicants for DI and SSI benefits must wait for eligibility decisions, both on initial applications and on appeal;
- * the due-process protections and appeal rights available to applicants and beneficiaries;
- * the accuracy of SSA eligibility decisions; and
- * the levels of service available to applicants and beneficiaries, in particular to those applicants who need assistance in developing a claim for benefits.

(MORE)

The Subcommittee also invites witnesses to identify costs and benefits of the reengineering plan, to suggest modifications, and to propose alternative means of increasing SSA's efficiency in processing disability applications.

REQUESTS TO BE HEARD:

The press release to be issued subsequently announcing the date and time of this hearing will also provide instructions on making requests to testify. Such requests will be accepted by the Committee only after the issuance of that release.

* * * *

FOR IMMEDIATE RELEASE
THURSDAY, MARCH 31, 1994

PRESS RELEASE #14
SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

THE HONORABLE ANDY JACOBS, JR. (D., IND.), CHAIRMAN,
SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
ANNOUNCES THE DATE AND TIME OF THE SUBCOMMITTEE'S HEARING
ON A PROPOSAL TO RESTRUCTURE THE SOCIAL SECURITY ADMINISTRATION'S
DISABILITY DETERMINATION PROCESS

The Honorable Andy Jacobs, Jr. (D., Ind.), Chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, today announced that the Subcommittee's hearing on a proposal to restructure the Social Security Administration's (SSA's) disability determination process will be held on Thursday, April 14, 1994, in room B-318 Rayburn House Office Building, beginning at 10:00 a.m. The proposal on which the hearing will focus is authored by SSA's Disability Reengineering Team and will be released by SSA for public comment on Friday, April 1, 1994. The details of the Subcommittee hearing are described in press release #13, issued on March 17, 1994.

DETAILS FOR SUBMISSIONS OF REQUESTS TO BE HEARD:

Requests to be heard at the hearing must be made by telephone to Harriett Lawler, Diane Kirkland or Karen Ponzurick [(202) 225-1721] no later than close of business, Thursday, April 7, 1994. The telephone request should be followed by a formal written request to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. The staff of the Subcommittee on Social Security will notify by telephone those scheduled to appear as soon as possible after the filing deadline. Any questions concerning a scheduled appearance should be directed to the Subcommittee staff. Witnesses can obtain a copy of the Disability Reengineering Team's proposal by calling the Subcommittee [(202) 225-9263].

In view of the limited time available to hear witnesses, the Subcommittees may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the filing deadline.

Witnesses scheduled to present oral testimony are required to summarize briefly their written statements in no more than five minutes. THE FIVE MINUTE RULE WILL BE STRICTLY ENFORCED. Chairman Jacobs advises witnesses that they will be allowed no more than two "finally's" and one "in conclusion." The Congressional Budget Office and similar U.S. Government agencies may be granted an exception to these restrictions. The full written statement of each witness will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question witnesses, all witnesses scheduled to appear before the Subcommittee are required to submit 200 copies of their prepared statements to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, at least 48 hours in advance of their scheduled appearance. Failure to do so may result in the witness being denied the opportunity to testify in person.

(MORE)

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Any person or organization wishing to submit a written statement for the printed record of the hearing should submit at least six (6) copies of their statement by the close of business, Thursday, April 28, 1994, to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 200 additional copies for this purpose to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

2. Copies of whole documents submitted or exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

* * * *

Chairman JACOBS. We have reached the appointed hour, and the hearing of the Ways and Means Subcommittee on Social Security will come to order.

Cochairman Bunning is here, which is all we need. Our first witness is Fortney Stark, who may be answering a quorum call. He said he probably will not testify.

[A statement for the record of Mr. Stark follows:]

TESTIMONY OF
THE HONORABLE PETE STARK
BEFORE THE
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON SOCIAL SECURITY
APRIL 14, 1994

Mr. Chairman: I would like to commend you and your subcommittee for holding this hearing so soon after the release of the Disability Process Redesign proposal.

I have been a critic of the length of time it takes for an individual to go through the process of applying for disability benefits. I have tried to get more money to hire the needed staff to facilitate the disability determination process.

So, I am encouraged by the work of the Disability Reengineering Team. I hope that the proposed process will treat claimants more humanely and render a decision more quickly. Creating the position of disability claim manager so that the same person can help a claimant through the first steps will be efficient and effective. Better and greater use of technology will speed up the process. Encouraging claimants to immediately submit a simple starter application will mean benefits will be retroactive to an earlier date than may happen now.

In addition, a program to educate more people about the Disability Insurance (DI) and Supplemental Security Income (SSI) disability programs will mean that the word could get out more quickly to potentially eligible claimants.

In the past, I have been a strong advocate of outreach programs to make sure that hard-to-reach populations know about the disability programs and are assisted in applying for benefits. I am heartened to read that efforts will be made to guarantee outreach efforts as part of the process.

Last May I introduced legislation which provides for demonstration projects to test whether enrollment in the SSI program can be significantly increased by offering nonprofit organizations financial incentives to engage in outreach. Therefore, I am pleased to read the suggestion of the Disability Reengineering Team to allow the Social Security Administration (SSA) to certify third party organizations to participate in the development of claims. Staff of nonprofit organizations often are already very knowledgeable about the DI and SSI programs and have the trust of the people with whom they work. These people would be able to aid potentially eligible people fill out the forms and collect the necessary documentation. SSA would monitor the third party organizations, ensuring the quality and integrity of the program.

Having sung the praises of the proposed process, I now would like to raise two issues for consideration.

Nowhere in the four-step evaluation process which allows or denies disability benefits is the term "presumptive disability" mentioned. I believe that even though the new process hopes to shorten the time people will have to wait for a decision, there is a reason to continue immediately awarding benefits to people who can be presumed to be eligible. Since the application process for DI and SSI disability payments will be more uniform, it makes sense - as the new process continues to be designed - to provide presumptive disability benefits to DI claimants as well as SSI claimants. I realize that this will require passage of legislation but, as a sponsor of such legislation, I am willing to work to bring this about.

My second concern relates to the impairments for which a presumptive disability decision could be made.

Our nation's hemophiliacs live in fear of even a minor injury because of the consequences of their blood being unable to clot. Transfusion or infusion of blood, blood components or blood products are their very life line. It was a terrible discovery to find out that the blood supply that was thought to be keeping hemophiliacs alive could be the vehicle of their death, a death that promised incredible complications and suffering. The blood bank and plasma center communities that should have been vigilant in monitoring the blood supply was frightened and intimidated into doing nothing to take the precautions necessary to stop the spread of HIV infection through contaminated blood.

We continue to be late in acknowledging the culpability of the scientific and medical professions for the transmission of the HIV virus to some people who needed blood during the early 1980s. We can never undo what transpired as a result of the failure of our nation's official agencies to regulate blood, blood components and blood products. But, we can admit that the suffering and disability of the people affected by a tainted blood supply continues to endure.

Therefore, I urge that hemophiliacs with HIV infection contracted through infected blood, blood components and blood products be added to the list of those for whom a disability should be presumed.

I would like to go even further than urging presumptive disability. In 1972 Congress required that end stage renal disease patients be quickly eligible for Medicare. In the future, under health care reform, all Americans will have health insurance regardless of pre-existing conditions or income. In the interim, however, the HIV-positive hemophilia community is suffering terribly, because of society's failure to ensure safe blood, blood components and blood products. As a bridge to health care reform, we should find a way immediately to help these people with the terrible costs of HIV and hemophilia.

Mr. Chairman, my thanks to you for the opportunity of testifying today and for the work you and the subcommittee continue to do to help the SSA be more expeditious and competent in processing disability applications.

Mr. BUNNING. Mr. Chairman, I have an opening statement I would like to make. Could I put my opening statement in?

Chairman JACOBS. Yes. I have a very brief statement to make.

I think what we have here is a proverbial better mousetrap. We go through life with assumptions, some of which are quite good and some of which are not. The assumption with any governmental organization is that significant change cannot be brought about. It is believed that if our betters before us have thought something through, that everything is OK, and things should just keep going the way they are.

I want to tell for the record a very, very short story about an aunt of mine in southern Indiana, a farm lady. We used to go down and visit, and they had what in those days was just known as a huge country kitchen with a wood stove that got so hot it turned red. The farm was not too far from Kentucky. You had to stay away from the stove, it was so hot, even in the middle of January. When you woke up in the morning, since there was no indoor plumbing, the water in the washbasins would be frozen.

Years later, they decided to cut a hole in the ceiling of the great room and put a register in, and the water froze no more. The heat went up. I asked my aunt years later, "Everybody knows heat rises. Why didn't you guys cut those holes much earlier?" She said, "Well, we were busy and we were doing what we were supposed to do, and we were so busy, it did not occur to us until years later."

I am glad that Dr. Chater and the others of Social Security have decided that heat rises and that something can be done to make change and, I think vastly improve the possibilities of efficiency in the Social Security Administration.

I yield to Mr. Bunning.

Mr. BUNNING. Thank you, Mr. Chairman.

I appreciate your desire to be responsive to SSA's redesign of the disability claims process. The current process has reached what I think is a crisis point. Our folks are simply not getting the good timely service they have a right to expect. My initial reaction to the proposal was how quickly can we get there from here?

The project director, Rhoda Davis, and her team have spent many hours producing this grand design. Some might even call it grandiose. I was struck, in reviewing it, with the staggering amount of work that needs to be done to complete the design itself, let alone the implementation of it. I am referring to the next steps referred to in appendix 5.

Will the Social Security Administration successfully develop a new organizational structure that ensures coordination and effective support to the entire disability claims process? Will SSA develop a comprehensive communications plan? Will SSA develop a new management information system? Will SSA complete the training activities necessary for the new system?

We need to see an implementation plan for this redesign. This report does not mention how the new disability claims managers will be trained and then integrated into the system. This report does not address the State's role versus the agency's role in this proposed system. And, more importantly, there is no mention of how that training or the entire redesign package will be paid for or how much it will cost.

The disability claims process redesign sounds wonderful. It will make a lot of people feel very good. But we need to see the real facts that go along with it. This is not meant as a rejection of the redesign itself. Many of the suggestions have very much merit.

The current process results in too many files being shuffled until the claimant becomes lost in the system. The design that reduces processing steps is very necessary. A promise of greater uniformity in the decisionmaking process between States and between States and the ALJs make this redesign very appealing.

But, candidly, Mr. Chairman, this redesign cannot be completed under Dr. Chater's tenure. According to the recent track record, SSA Commissioners just do not last that long. I would be more comfortable with this long-term effort, if there was more stability in SSA. For example, if my bill, H.R. 1864, which makes SSA an independent agency, would pass by this committee and be signed into law, then SSA would have the stability it needs to start this project. That, Mr. Chairman, is a good reason why we should do just that.

Thank you again. I look forward to our witnesses' testimony, and hope they address these issues very well.

Chairman JACOBS. Thank you, Mr. Bunning.

Dr. Chater, you are the first witness who is here. You are not planning to resign to be a baseball commissioner, are you? We hope you are around for a long time. [Laughter.]

STATEMENT OF HON. SHIRLEY S. CHATER, PH.D., COMMISSIONER OF SOCIAL SECURITY; ACCCOMPANIED BY RHODA M.G. DAVIS, DIRECTOR, PROCESS REENGINEERING PROGRAM; AND KELLY CROFT, DIRECTOR, DISABILITY PROCESS REENGINEERING TEAM

Ms. CHATER. Me, too. Thank you.

Mr. Chairman and members of the committee, I am extremely pleased to be here today. You may recall, Mr. Chairman, that my first congressional hearing as the Commissioner of Social Security was before this subcommittee, and at that time I told you that my goal was and still is to provide world class service to the millions of people who come to the Social Security Administration for assistance. Today, we will be discussing a proposal that has the potential to take us so much closer to achieving that goal.

I would like to submit my full written testimony for the record and, with your approval, I will be sharing my testimony time this morning with Rhoda Davis, to my left, the director of SSA's process reengineering program, who in a moment will discuss the details of the disability reengineering program.

I am also joined by Kelly Croft on my right, who was our disability process reengineering team leader. Together with all of us in the room, we have members who served on that team who have provided for us this reengineering proposal.

We all agree that the Social Security disability process is in need of change. The agency is utilizing processes that are based in large part on concepts developed over 40 years ago, and those processes are not equipped to meet today's overwhelming service demands.

In fiscal year 1995, we estimate that we will receive 69 percent more disability claims than we received in fiscal year 1990. The

number of people who appeal a decision is estimated to increase by 75 percent over the same 5-year period.

In the past, the Social Security Administration has responded to these sharp increases by devoting approximately half of the agency's administrative budget to processing disability-related workloads. And I would direct your attention to the chart, which very clearly shows the distribution of our administrative budget on all other SSA activities versus a little over 50 percent devoted to disability claims.

Now, despite this major shifting of resources and despite the tireless efforts of our employees and those of the State disability determination services, an average initial claim still takes about 100 days to process, and a hearing request takes about 265 days. Claimants are waiting too long for decisions, and we know this is an intolerable situation to this administration, to the Congress and to the American public.

But we have concluded, and I think it is fair to say that others, including the General Accounting Office, have concluded as well, that in order to significantly improve the disability claims process, a radical change—reengineering—is necessary. And by reengineering, I mean redesigning the process completely from start to finish, to make the process many times more efficient than it is today.

We decided that small incremental improvements in the disability claims process would not result in significantly improved service to the public. So the answer had to be comprehensive, radical redesign.

An experienced group of SSA and DDS employees was selected to take on this task. We charged the disability process reengineering team to ask and answer the question: How would we do this better, if we were starting over today? To answer that question, the team conducted interviews across America with more than 3,000 Federal and State workers, and over 700 representatives from the medical and legal community, disability advocates, congressional staffs and other interested groups.

The result of this outreach and their deliberation is the disability reengineering proposal which was submitted to me on March 31, 1994. We plan a period of review of the proposal, from April 1 through May 27, and I would emphasize that this is only a proposal, a framework. We have asked for comments and suggestions from Congress, from the public, from advocates for the disabled, from our own employees and others, so that we can move from proposal to final redesign.

I do want to stress to you that this is a proposal, that it is not a final plan. It is intended to provide a broad understanding of how a redesigned process will work, but still leaves the operational, organizational, and some other details for later development.

I also want to emphasize that the proposal deals with the disability determination process, and will not affect the statutory criteria for determining whether a claim is approved or denied.

So at this point, Mr. Chairman, with your permission, I would like Ms. Davis to tell us briefly about the proposal, and then I will describe the steps that we will take to collect and analyze public comment on the proposal and talk a little bit about the long-term implementation of the proposal.

Thank you.

Ms. DAVIS. Thank you, Commissioner Chater.

Mr. Chairman and members of the committee, the reengineering team's charter directed them to radically redesign the initial eligibility administrative process. The team was not to address the following in their design: The statutory definition of disability, individual benefit amounts, use of an ALJ as the presiding official for administrative hearings, or steps in the posteligibility process, such as referral for vocational rehabilitation and continuing disability reviews.

In developing the proposal, the team's methodology called for them to review and analyze what happens in the process today. Our background report contains many facts about the current process. I want to highlight the chart to my left entitled "Time Expended."

This chart, which is in the report, shows that in the course of the days that an average claim is in the process at the initial level, first on the left, most of the time is spent with the case in an in-basket waiting for action, being checked, waiting for a medical examination of the claimant to be purchased and conducted, waiting for medical evidence of record to come in, simply moving from place to place, and waiting to be scheduled for an interview. Someone actually works on the case, which we have labeled "Task Time," only 13 hours of the total 100-plus days.

This chart tells a similar story for the claim that goes through the three stages up through hearing in the initial eligibility determination process. In the average 1½ years it takes to get through the three stages that culminate with a hearing, a total of 32 hours is spent working on the case: 32 hours out of 1½ years is the task time.

The proposal is intended to streamline the process to maximize the quality of service it provides. The key features of the proposal include establishing three key positions in the process; a disability claims manager to be the claimants' primary contact point and decisionmaker at the initial level, an adjudication officer to prepare the claimant for hearing, and an administrative law judge to conduct the hearing.

The second key feature is developing a simplified disability decision methodology in order to produce consistent decisions by all adjudicators. The third is offering a claimant the opportunity to personally discuss the case, to ensure that all possible evidence has been developed before an initial denial.

Next is empowering claimants who are able to do so to help develop evidence and clarifying a claimant representative's responsibility to develop evidence. Next is revising the role of the Appeals Council to focus on quality in the hearing process. Next is providing significant automation support to all employees in the process, and finally building a quality review system that puts quality into the process and monitors the entire process in the same way.

The streamlining results of the team's proposal are reflected in the next chart labeled "Comparison of Decisional Time." This chart is also in the report. The initial processing time drops from a total of 155 days on average to less than 40 days. Total processing time

through all four stages of the current process drops from over 2 years to less than 6 months.

Mr. Chairman, you had asked about the impact of the proposal in several key areas. The first, due process, is an area of critical importance to Commissioner Chater. The proposal emphasizes the importance of obtaining all evidence pertinent to the claimant's case. It speeds up decisions, enabling those who seek appeals in the courts to do so more quickly.

Second, regarding the accuracy of decisions, the proposal's critical elements begin with the premise that quality must be built into the process. Therefore, it proposes better ongoing training, the initial decisionmaker doing the actual interview, and a quality assurance system that looks at a sample of cases across levels and communicates defined quality standards to all employees.

Third, as to service, the proposal maximizes claimant choice in accessing the process. It facilitates help by third parties. It gives the claimant a single point of contact at each stage. It emphasizes that while some claimants are able to help develop their cases much more than we allow them to do today, others need assistance that we will provide.

Mr. Chairman, the team's proposal seeks to serve claimants dramatically better than we do today. The team understands that doing so begins with protecting claimants' rights. This has been a very brief overview of the proposal. Commissioner Chater now will conclude her statement.

Ms. CHATER. I am eager to answer your questions about the proposal, but first I would just like to talk a little bit about my expectations for the next few weeks. With the release of the proposal on March 31, we began a period for public comment. The proposal will be published in the Federal Register, and we are conducting major outreach efforts to ensure that individuals and organizations with an interest in disability are fully informed and have the opportunity to express their views and comments to us.

This summer, after we receive the comments and suggestions, we will make decisions about the redesign proposals which will turn the proposal into a plan. I hope that I might return to this committee to discuss those decisions with you. It is our intent to implement improvements to the process beginning this fall.

To the extent that legislation will be required to implement aspects of the redesign process, we will certainly count on consulting with you and relying on advice from this subcommittee. We look forward to working with Congress to shape the final design of a vastly improved disability process, a process that we feel certain will enable us to provide a better service to disability applicants.

I now would be happy to answer your questions.

[The prepared statement and attachment follow:]

**TESTIMONY OF SHIRLEY S. CHATER, COMMISSIONER
SOCIAL SECURITY ADMINISTRATION**

Mr. Chairman and Members of the Subcommittee:

I am excited to be here today to discuss a proposal by the Social Security Administration's (SSA's) Disability Process Reengineering Team to restructure the application process for Social Security and supplemental security income (SSI) disability benefits.

Introduction

As you know, Mr. Chairman, in October 1993 I testified before this Subcommittee for the first time as Commissioner of Social Security. I told you that my goal is to provide not just good service but world-class service to the millions of people who look to SSA for help. I described our plans to "reengineer" some of our business processes that are based in large part on procedures begun 40 years ago.

By "reengineering," we mean viewing each process as a whole, from start to finish. We will focus on the customer's needs, and redesign the process to eliminate fragmentation and duplication within the organization. The goal of reengineering is to dramatically improve efficiency, rather than just make small, incremental improvements in pieces of the process.

Because of the enormous challenges facing the disability program in the form of unprecedented workloads, we determined that our first reengineering effort would address the disability determination process. Workload statistics which showed higher backlogs and claimants experiencing longer processing times clearly indicated a process in need of a radical redesign.

We challenged a special team of talented SSA and State disability determination services (DDS) employees with a wide range of experience and expertise in the disability process to fundamentally rethink the way we process claims for disability benefits. We asked, "How would we do this better if we were starting from scratch?" I am extremely proud of how effectively the Disability Process Reengineering Team has responded to this challenge. Over the past 6 months, the Team conducted interviews across the Nation with more than 3,000 front-line Federal and State workers and with more than 700 representatives from the medical and legal communities, disability advocates, congressional staffs, and other groups. Today, I am very pleased to tell you about the proposal that the Team submitted to me and the Reengineering Executive Steering Committee (SSA senior managers, union officials, and presidents of professional organizations in SSA and the DDSs) at the end of last month.

Let me emphasize three points: First, this is a proposal, not a final plan. Second, the proposal contains recommendations made by employees and others who are most knowledgeable about the disability process. Third, the proposal represents a high-level concept to provide a broad understanding of how a redesigned process would work but leaves operational, organizational, and other details for later development.

Certainly, it is unusual to discuss publicly a proposal before it has been approved through the Administration. However, we believe that the insights we can obtain over the next 60 days from the Congress, disability advocates, the public, and SSA and DDS employees will be very important in redesigning the disability determination process.

I would like now to discuss further the state of disability claims workloads, our Process Reengineering Program concept, the Disability Process Reengineering Team's recommended proposal, how its recommendations might impact on key public service aspects, and our next steps.

Disability Workloads

Disability claims receipts at the initial and appeals levels have reached all-time highs: In fiscal year (FY) 1995, initial claims requiring a disability determination are estimated to increase by 69 percent over FY 1990 levels. Appeals workloads are expected to increase by 75 percent over FY 1990 receipt levels. About half of SSA's total administrative budget now is devoted to processing these large workloads. Despite these resources, claimants have to wait much longer than we would like at each stage in the process. Not only that, SSA and DDS employees are working longer and harder, while becoming increasingly frustrated about their inability to provide the level of service the public deserves. An average initial claim now takes about 100 days to process, according to SSA's computer-based processing time reports. A hearing request takes about 265 days to process, according to these same reports. This is too long.

One of the main reasons why the current disability process takes so long is that many employees handle each claim. As many as 26 employees are now involved in processing an initial disability claim, and about 45 employees are involved in processing an appeal in which the claimant has requested a hearing before an administrative law judge (ALJ).

SSA Process Reengineering Concept

Before beginning our reengineering program, we conducted a rigorous, high-level investigation of the reengineering efforts, organizations, and methodologies of companies, public organizations, academic institutions, and consulting firms with the most hands-on experience in reengineering. Based largely on what has worked best in the private sector, SSA developed its own methodology. We adopted a team approach that combines a strong customer focus with classic management analysis techniques and computer modeling and simulation to intensely review a single process.

We then asked the Disability Process Reengineering Team to do four things: First, identify ways to make the process more customer and service oriented. Second, greatly increase productivity and process speed. Third, take better advantage of new technology. Finally, find ways to help empower and enrich SSA and State employees who are part of the process.

Disability Reengineering Proposal

The Disability Process Reengineering Team looked at basically every aspect of the disability determination process for initial eligibility, with four exceptions. The project did not include changes to the following:

- o The statutory definition of disability;
- o Individual benefit amounts;
- o Use of an ALJ as the presiding official for administrative hearings; and
- o Predominately post-entitlement activities such as vocational rehabilitation and continuing disability reviews.

I am submitting with my statement a summary of the key features of the redesign proposal for the record. The proposal would streamline and improve the current disability determination process. The proposal would:

- o Redesign key employee positions. Disability claim managers at the initial level and adjudication officers at the ALJ hearing level would serve as the claimant's primary

contact(s) with SSA. They would manage the disability claim as it moves through each adjudicative level. The disability claim manager would also make the decision to allow or deny an initial claim, using a simplified disability decision methodology designed to produce consistent decisions among adjudicative levels, and effectuate payment;

- Establish a pre-denial interview. If the decision on an initial claim appears to be a denial, SSA would offer the claimant an opportunity to submit additional information and/or to have an in-person or telephone interview with the decisionmaker before the claim is formally denied. This would eliminate the reconsideration appeal level;
- Rely on evidence submitted by claimants (to the extent that they are able to do so) to make the decision and, if the claimant is represented, make the representative responsible for developing evidence;
- Authorize the adjudication officer to conduct pre-hearing conferences to narrow the case issues and, if the evidence warrants, issue favorable decisions based on the record;
- Eliminate Appeals Council review as a prerequisite for seeking judicial review of hearing decisions, and revise the Council's role to include only discretionary own-motion preeffectuation reviews of ALJ decisions and review of all claims in which a civil action has been filed, to determine whether to defend the ALJ decision as the Secretary's final decision;
- Facilitate employees' ability to do the total job by providing automation and decision support systems that would enable more consistent and accurate decisionmaking; and
- Establish a quality review system that would include comprehensive review of the whole adjudication process, both disability and non-disability issues, allowances and denials, and at all levels of decisionmaking.

Though these changes may require some legislative and regulatory actions, the proposal would preserve the statutory framework and intent of the disability program.

By implementing these changes, the Team thinks we can cut the time between a claimant's first contact with SSA and issuance of a final initial disability decision from an average of 155 days to less than 40 days. The number of employees actually processing the case would decrease to about 7-8 employees, down from as many as 26 employees now. Also, the time from a claimant's first contact with SSA until issuance of a hearing decision would drop from an average of a year-and-a-half to about 5 months, and the process would involve no more than 14 employees, compared with about 45 employees currently.

Impact on Service to the Public

Mr. Chairman, you asked about the expected impact of the disability reengineering proposal on several key aspects of SSA's service to the public: claims and appeals processing times, which I have already covered; due-process protections and appeal rights; the accuracy of SSA's eligibility decisions; and the levels of service available to applicants and beneficiaries, particularly those who need help in developing a claim for benefits. The Team that put this proposal together did it with an eye toward enhancing service. They do not expect the proposed

changes to have an adverse effect upon customer service. To the contrary, they expect the changes to improve our service for the following reasons:

- The proposal's recommendations would not change the right to appeal an unfavorable decision and receive due process. The claimant would have two administrative opportunities to submit additional evidence -- the pre-denial interview and the ALJ hearing. Further, the pre-denial interview would give the claimant an opportunity for a face-to-face interview with the decisionmaker earlier in the process. Cutting out the reconsideration and the Appeals Council steps could speed up the administrative decisionmaking process. Claimants dissatisfied with the Secretary's final decision on their cases could appeal more quickly to the Federal courts.
- Under the proposal, better employee training, observation of claimants' impairments in early face-to-face interviews, and a more rigorous quality assurance system could produce more accurate disability decisions sooner. The comprehensive quality assurance system would define quality standards and communicate them to employees in a clear and consistent manner. It would also provide employees with the means to perform top-quality work.
- Individuals would retain choices about the ways in which they deal with SSA -- in person, by telephone, through the mail, or electronically. Claimants could also rely on third parties, such as medical, legal, and community organizations, to help them deal with SSA. Also, the disability claim manager would serve as the claimant's primary contact with SSA on the status of a claim and would provide claimants with a clear understanding of how the process works. This manager would provide personal assistance where necessary to help claimants in developing their claims. Many claimants have expressed a desire to become more actively involved in developing their own claims, and the manager would provide them with the information they need to participate more fully in the process.

The Team believes that these changes would go a long way toward addressing your important concerns about protecting applicants' and beneficiaries' rights.

Next Steps

With release of the proposal on March 31, we began a 60-day national dialogue period to receive public comments on it. We are publishing the proposal in the Federal Register and are conducting a major outreach effort to ensure that all key individuals and organizations are fully informed about the Team's proposed redesign, and that they have meaningful opportunities to express their views and comments. This dialogue period, which will include a public meeting to discuss the proposal, concludes at the end of May.

During this 60-day dialogue period, we are particularly interested in your thoughts and comments as well as those of the American public on how well the proposal meets the tests we established for measuring improvement in the disability process in the Team's charter:

- Is it "user friendly" for claimants and those who assist them?
- Will the correct decision be made the first time?
- Will the decision be made and effectuated quickly? and
- Is the decisionmaking process efficient?

We will consider all views received during the comment period. We expect to make decisions on the proposal and the disability redesign by this summer. At that point, we would be glad to meet with you to go over our decisions. We will embark upon a wide range of implementation activities and reach agreement on the first operational changes by the end of September. However, some aspects of the redesigned process, such as those requiring regulatory and legislative change, will take longer. Of course, to the extent that legislation is required to effectuate our decisions, we will be consulting with you, Mr. Chairman, and we would rely on your assistance.

Conclusion

In summary, Mr. Chairman, we thank you again for providing this forum to discuss the Disability Process Reengineering Team's proposal to redesign the Social Security and SSI disability determination process. You can be sure that we will study all comments we receive about the proposal most carefully before making final decisions on the recommendations. We look forward to working closely with the Congress as we move forward to shape the final design of a reengineered disability process that will bring us much closer to providing world-class service to disability applicants.

Attachment

Disability Process Redesign

The Proposal from the
SSA Disability Process
Reengineering Team

April 1994

Disability Process Reengineering Team

U. S. Department of Health and Human Services
Social Security Administration
SSA Pub. No. 01-003

This report is a summary of the Disability Reengineering Team's proposal to SSA for reengineering the disability process; this is not a final SSA proposal. The Commissioner of SSA asks interested parties to comment on the proposal within the next 60 days.

The full report, including background, will be released to all SSA and DDS facilities by mid-April. Parties external to SSA may request a copy of the full report by telephoning (410) 966-8255.

Introduction

A claimant for disability benefits from the Social Security Administration faces a lengthy, bewildering process. An initial decision from SSA will likely take more than three months. Anywhere from 16 to 26 employees

will handle the claim before the initial decision is reached. If that decision is a denial, and the request for reconsideration is also denied, chances are the claimant will hire an attorney. It will likely be an additional eight months or more before a response on the hearing is received, and even longer before a check is issued or eligible dependents' benefits are paid. As many as 45 employees could handle the claim.

Shirley Chater

January 1994

Commissioner's Bulletin,
"The Challenge of Change"

If the claim for benefits is approved after a hearing, the claimant will view the SSA disability application process as one which requires jumping through lengthy bureaucratic hoops. Dealing in person or on the telephone with SSA field office staff and, possibly, the State disability determination service (DDS) staff at the initial and reconsideration levels, the claimant must appear at a hearing to finally talk to a person in a position to make a decision on the claim. The claimant will rate SSA employees as courteous and knowledgeable, but the disability determination process as bureaucratic and unresponsive.

SSA employees reiterate this belief, as illustrated in the following statement by a claims representative, "I wish we could stop shuffling all this stuff back and forth. I don't really know what the DDS is looking for, so I try to do the best generic job I can on these forms."

SSA has reached a critical juncture; disability claims receipts at the initial claims and appeals levels have reached all time highs—Fiscal Year (FY) 1995 claims requiring a disability determination will increase 69 percent over FY 1990 levels; appeals workloads will increase 75 percent over FY 1990 receipt levels; employees in field offices, DDSs and hearing offices are overburdened despite recent significant increases in productivity. As an agency, SSA must vie for scarce administrative resources in an era of spending limitations and competing social spending priorities. The ability of SSA to cope with further workload increases is questionable; it is clear that only radical change can address the disability service delivery problems facing the Agency today.

SSA is meeting this challenge with an unprecedented effort to reengineer the entire disability process—from the point a potential claimant first contacts the Agency to file for disability benefits, through the disability allowance or final administrative appeal. Reengineering the disability process involves asking the question, "Given what we know about technology and resources available to us today, how can we best design a disability process for the 1990s and beyond?" This report will answer that question by proposing a radical redesign of disability program policies and procedures, to ensure

When someone asks us for a quick definition of business reengineering, we say that it means 'starting over.' It doesn't mean tinkering with what already exists or making incremental changes that leave basic structures intact. It isn't about making patchwork fixes—jury-rigging systems so that they work better. It does mean abandoning long-established procedures and looking afresh at the work required to create a company's product or service and deliver value to the customer.

Michael Hammer &
James Champy,
"Reengineering the Corporation:
A Manifesto for Business Revolution"
(New York: HarperCollins
Publishers, Inc., 1993), p. 31

dramatic improvements in the way the entire process works and is managed to serve the American public.

The report represents the collective efforts and recommendations of the 18-member Disability Reengineering Team, composed of Federal and State employees, operating under the auspices of the Director of the SSA Process Reengineering Program, and the SSA Executive Steering Committee formed to provide advice to the Commissioner on the disability reengineering process change proposal development.

The Executive Steering Committee provided the following parameters for the disability reengineering proposal: "Every aspect of the process except the statutory definition of disability, individual benefit amounts, the use of an administrative law judge as the presiding officer for administrative hearings and vocational rehabilitation for beneficiaries is within the scope of this reengineering effort."

Current Process

The current disability process served SSA and the public well for a number of years. However, over the last several years, as workloads have increased dramatically, the current process has been placed under increasing stress.

The procedures in the current process have not changed in any significant way since the Social Security Disability Insurance (DI) program began in the 1950s, a time when caseloads, demographic characteristics of claimants, types of disabilities, and available technology were radically different. In the 1970s, Congress federalized State programs of cash assistance to the aged, blind and disabled into the Supplemental Security Income (SSI) program and added this to the responsibilities of SSA. SSA then adopted the DI disability determination procedures for SSI blind and disabled claims.

The upward trend in the number of claims for benefits SSA has received is reflected in the increases in disability initial claims and appeals workload receipts over the last several years. These increases have occurred concurrently with significant downsizing activity in SSA and staffing fluctuations in the State DDSs. Even so, the total costs for processing initial disability and appeals determinations remain enormous--more than half of SSA's total \$4.9 billion administrative costs in FY 1993 were devoted to these tasks.

Despite these funds, and despite directing a larger percentage of SSA's resources toward disability initial claims and appeals processing in recent years, average processing times for initial claims, as well as appeals, have escalated dramatically since 1988. Initial claims processing time is up from about 80 days in FY 1988 to approximately 100 days today. The average time to process a hearing has grown from about 212 days in FY 1988 to about 265 days today.

A claim must now pass through from 1 to 4 decisional paths within SSA to receive a favorable disability decision. The initial claim, reconsideration, administrative law judge (ALJ) hearing and Appeals Council review levels all involve multi-step uniform procedures for evidence collection, review, and decisionmaking.

An initial claim currently takes an average of 100 days to process from the time it is filed until a final decision is made according to SSA's computer-based processing time measurements. However, a better understanding of how long the process takes from the claimant's perspective comes from a 1993 study conducted by SSA's Office of Workforce Analysis, which showed that an average claimant waits up to 155 days from the *initial contact* with SSA until receiving an initial claim *decision notice*. Sixteen to 26 employees handle the claim during this period.

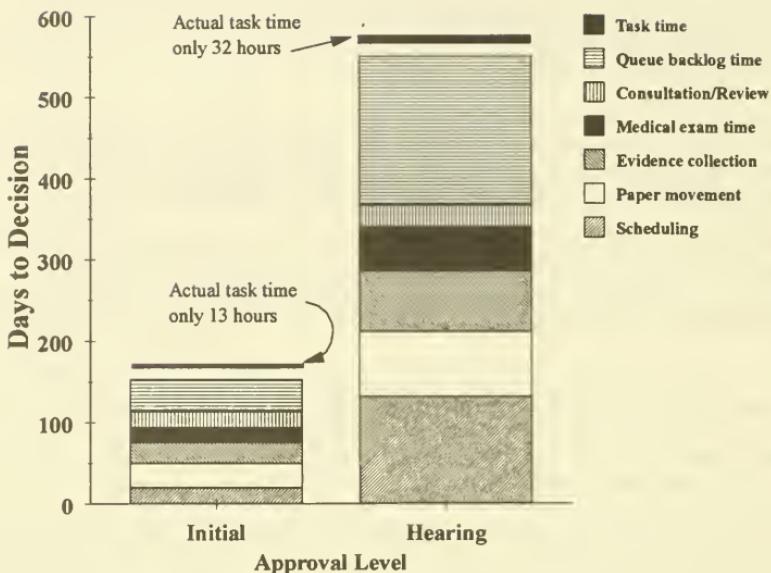
An average reconsideration itself takes about 50 days according to SSA's computer-based processing time reports—however, according to the Office of Workforce Analysis study, a claimant is involved with the SSA process for roughly 8 months from the point of initially contacting the Agency, and up to 36 different employees could handle the claim.

The hearing process itself takes about 265 days and Appeals Council reviews about 100 days according to computer-based reports. However, according to the Office of Workforce Analysis study, a claimant has been dealing with SSA for over a year and a half at the time a hearing decision is issued, and about two years by the time the Appeals Council decision is issued.

At least part of the recent increases in processing time result from the time added as the claim moves from one employee or facility to another (handoffs), and waits at each employee's workstation to be handled (queues). As workloads increase, the amount of time a claim waits at each processing point grows.

"Task time" is the time employees actually devote to working directly on a claim, rather than the total amount of time it takes for a claimant to receive a final decision. Based on the Office of Workforce Analysis study, a claimant can wait as long as 155 days from the first contact with SSA until receiving an initial claim decision notice—of which only 13 hours is actual task time. The same study reveals a claimant can wait as long as 550 days from that initial contact through receipt of the hearing decision notice—of which only 32 hours is actual task time.

**Time Expended
(Figure 2)**



The Team's research methodology called for extensive site visits and interviews with members of the disability community. Team members visited 421 locations in 33 States and conducted over 3,600 interviews with SSA front-line employees, managers and executives, and with members of the medical, legal, advocate and interest group community—in order to obtain their views. Additionally, the Team analyzed the results of focus groups involving disability claimants and the general public in order to determine what SSA customers experience and expect from the disability process.

New Process

Overview

A claimant for disability benefits under the proposed process will be provided a full explanation of SSA's programs and processes at the initial contact with SSA. The claimant and third parties will be able to assist in the development of the claim, deal with a single contact point in the Agency, and request a personal interview with the decision maker at each level of the process. If the claimant requests a hearing, the issues and evidence to be addressed at the hearing will be focused, the responsibilities of representatives clarified and, if the claim is approved, the effectuation of payment to the claimant, eligible dependents and the representative streamlined.

The new process will result in a correct decision at the initial level by simplifying the decision methodology, providing consistent direction and training to all decision makers, enhancing the collection and development of medical evidence, and employing a single quality review process across all levels.

A single claim manager will handle most aspects of the initial level claim, thus eliminating many steps caused by numerous employees handling discrete parts of the claim (hand-offs) and the time lost as the claim waits at each employee's workstation to be handled (queues). This will reduce the time needed to rework files and redevelop information from the same medical sources. Levels of appeal will be combined and improved, reducing the need to redevelop nonmedical eligibility factors after a favorable decision because less time will have elapsed since initial filing.

Putting people first means that the Federal Government provides the highest quality service possible to the American people. Public officials must embark upon a revolution within the Federal Government to change the way it does business. This will require continual reform of the executive branch's management practices and operations to provide service to the public that matches or exceeds the best service available in the private sector.

President Bill Clinton,
Executive Order No.12882,
September 11, 1993

The proposed process will enable the current work force to handle an increased number of claims, freeing the most highly skilled staff (physicians and ALJs) to work on those cases and tasks that make the best use of their talents, and targeting expenditures for medical evidence to those areas most useful in determining disability.

Employees will perform a wider range of functions, using their skills to their full potential, enabling them to meet the needs of claimants, and minimize unnecessary rework. The proposed process will facilitate employees' ability to do the total job by providing technology and the support to use that technology.

The New Process — A Brief Description

Under the proposed process, the number of appeal steps will be reduced and opportunities for personal interaction with decision makers will be increased. At the initial claim level, the claimant will be offered a range of options for filing a claim, pursuing evidence collection, and conferring with a decisionmaker, using various modes of technology to interact with SSA. At the hearing level, the claimant will have an additional opportunity to participate in a personal conference and meet with a decisionmaker.

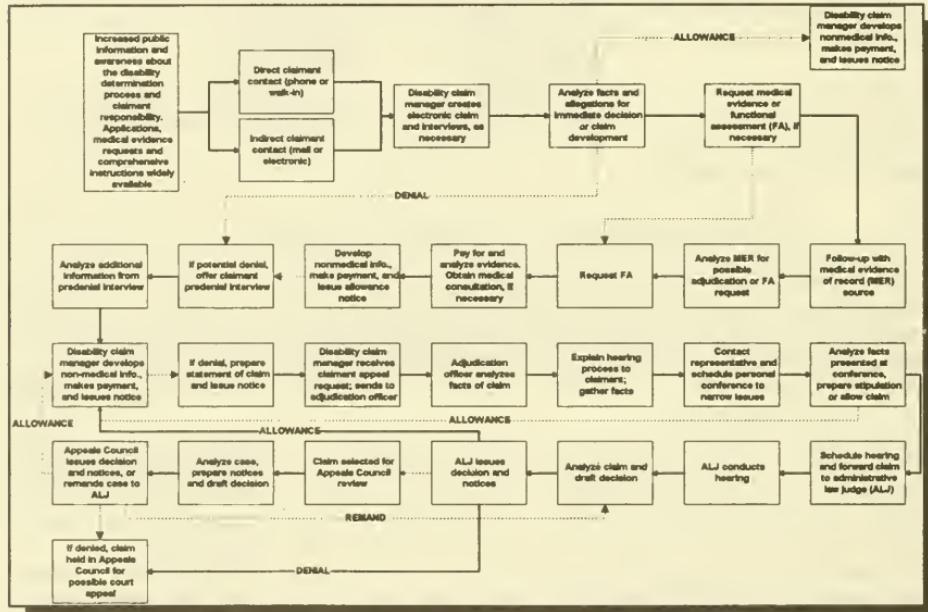
Claimants initially will deal almost exclusively with a disability claim manager—a front-line employee knowledgeable about the medical and nonmedical factors of entitlement—responsible for making the initial determination, with technical support if necessary, to allow or deny the claim.

The disability claim manager will determine the level of development needed to make a disability decision using a simplified determination methodology; relying on evidence submitted through the efforts of the claimant (whenever the claimant is able to do this); requesting medical evidence or a functional assessment; or referring complex medical questions to a medical consultant for expert advice and opinion, if necessary. The disability claim manager will contact the claimant if the decision on a claim appears to be a denial. The claim manager will explain the situation including the evidence that was considered, and offer the claimant an opportunity to submit additional information as well as an option for an interview in-person or via telephone, before the claim is formally denied.

All initial claims will be subject to a randomly selected postadjudicative national sample review designed to determine whether disability policies are being properly applied. Extensive ongoing training will enable adjudicators to consistently issue correct decisions. By the time the initial decision is issued, the claim will have been handled by seven or eight employees.

A claimant wishing to appeal an unfavorable initial decision to an ALJ will continue to have 60 days to file a request for a hearing. The disability claim manager will assist the claimant with the request, and forward the claim to an adjudication officer. The adjudication officer will be responsible for explaining the hearing process to the claimant, as well as conducting personal conferences, preparing claims, and scheduling hearings. The adjudication officer will have the authority to allow the claim at any point prior to the hearing that sufficient evidence becomes available to support a favorable decision.

The ALJ will conduct the hearing and issue the decision. At any point in the process where the claim is approved, it will be returned to the claim manager for payment effectuation, whether the claim is DI, concurrent, or SSI. Denied claims will be forwarded to the Appeals Council, for retention in the event of civil action. At this point, an average claimant will have been dealing with SSA for approximately five months from the first contact with the Agency. A total of up to 14 employees will have been involved with the process during this entire period.

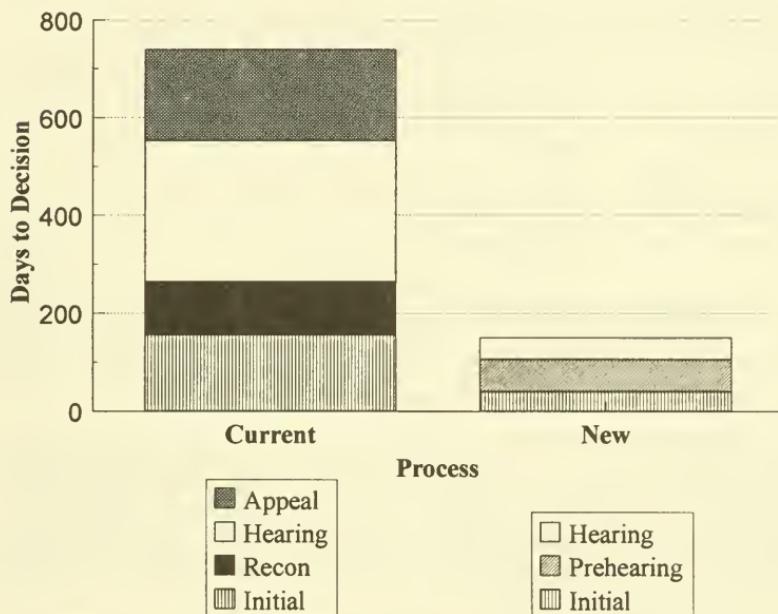


An ALJ decision will be the final decision of the Secretary, subject to judicial review, unless the Appeals Council reviews the ALJ decision on its own motion. The Appeals Council will conduct reviews of ALJ allowances and denials prior to effectuation, at its discretion, and on its own motion. The Appeals Council will also review all claims in which a civil action has been filed, and decide whether the ALJ decision should be defended as the final decision of the Secretary. If a claim is selected for own motion review, a total of 17 employees will have been involved in the process from first claimant contact with SSA through Appeals Council review.

The time from a claimant's first contact with SSA until issuance of a final decision will be reduced from an average of 155 days (as cited in SSA's Office of Workforce Analysis study) to less than 40 days, enhancing SSA's capacity to provide world-class service. Available employees will be able to process a greater number of claims, and devote more time to each claimant, providing more personalized service.

The time from a claimant's first contact with SSA until issuance of a hearing decision, will be reduced from an average of a year and a half (as cited in SSA's Office of Workforce Analysis study) to approximately 5 months.

Comparison of Decisional Times
(Figure 4)



Detailed Description of New Process

Process Entry and Intake

The disability claims entry and intake processes will reflect the SSA commitment to providing world-class service to the public. The hallmarks of the process will be accessible, personal service that ensures timely and accurate decisions. SSA will work to make potential claimants better informed about the disability process and fully prepare them to participate in it. SSA will also be flexible in providing modes of access to the claims process that best meet the needs of claimants.

and the third parties who act on their behalf. SSA will provide claimants with a single point of contact for all claims-related business. Finally, SSA will ensure that the disability decisionmaking process promotes timely and accurate decisions.

SSA will make available to the general public comprehensive information packets about the Disability Insurance (DI) and Supplemental Security Income (SSI) disability programs. The packets will include information about the purpose of the disability programs; the definition of disability; the basic requirements of the programs; a description of the adjudication process; the types of evidence needed to establish disability; and the claimant's role in pursuing a claim.

SSA will make disability information packets commonly available in the community, both at facilities frequented by the general public and at facilities frequented by potential claimants. SSA will make a special effort to target its public information activities at known sources of referrals for claims. SSA will also make the disability information packets available electronically.

In addition to comprehensive program information, the packets will describe the types of

See, it might take a lot of time to have somebody come out to the house to fill out the application, but they sure got enough time to go through three kinds of appeal. Take those manhours used for appeals and use it for the application.

General Public Focus
Group Participant,
Denver, 12/02/93

information that a claimant will need to have readily available when the individual files a claim. It will also contain two basic forms: the first, designed for completion by the claimant, will include general identifying information and will serve as the claimant's starter application for benefits; the second, designed for completion by the treating source(s), will request specific medical information about a claimant's alleged impairments. SSA will encourage claimants to review the information in the packet and have the basic forms completed prior to telephoning or visiting an SSA office to apply for disability benefits. Claimants filing for SSI will be encouraged to immediately contact SSA or submit starter applications to protect the filing dates for benefits. The starter application will serve as a claim for both programs, but will include a disclaimer should the claimant

want to preclude filing for benefits based on need (i.e., SSI).

Claimants may choose to enter the disability claims process by telephoning the SSA toll-free number, electronically, by mail, or by telephoning or visiting a local office. Claimants may also rely on third parties to provide them assistance in dealing with SSA, or may formally appoint representatives to act on their behalf in dealing with SSA. SSA managers will also have the flexibility to tailor the various service options to their local conditions, considering the needs of client populations, individual claimants, and the availability of third parties who are capable of contributing to the application process.

If an individual submits a starter application by mail or electronically, SSA will contact the claimant to schedule an appointment for a claims intake interview or, at the claimant's option, conduct an immediate intake interview by telephone.

If an individual telephones SSA to inquire about disability benefits, the SSA contact will explain the requirements of the disability program, including the definition of disability, and provide a general explanation of evidence requirements. The SSA contact will determine whether the individual has the disability information packet, and mail it or advise the claimant regarding possible means of electronic access. If an individual indicates a desire to file a claim at that time, the SSA contact will complete the starter application, available on-line as part of the automated claims processing system, to protect the claimant's filing date and schedule an appointment for a claims intake interview. The interview may be in person or by telephone at the claimant's option. If the individual has no medical treating sources, the SSA contact will annotate this information within the on-line claim record.

If a claimant visits an SSA office, the SSA contact will refer the claimant for an immediate claims intake interview or, at the claimant's option, complete the starter application and schedule a future appointment for an intake interview. In all cases, appointments for claims intake interviews will be made available within a reasonable time period, generally 3 to 5 working days, but no later than two weeks.

Local management will determine how to best accommodate claimants' needs in learning about the disability process and completing a claims intake interview. Additionally, depending on the nature of the individual's disability, SSA may encourage the individual to file in person when it appears that a face-to-face interview will assist in the proper claims intake and development. In any case, SSA will make every reasonable effort to meet the needs of the claimant in completing the application process.

Similarly, local managers will modify the claims entry and intake process to provide maximum flexibility for representatives who act on behalf of claimants or third parties who can assist claimants in completing the application process. Interested third parties will be encouraged to participate in the development of claims. Local managers will also conduct outreach efforts that are designed to meet the needs of hard-to-reach populations or assist those individuals unable to access the SSA claims process without considerable intervention.

A disability claim manager will have responsibility for the complete processing of an initial disability claim. However, the disability claim manager will also be able to call on other SSA resources such as medical and technical support personnel to provide advice and assistance in the claims process.

The disability claim manager will rely on an automated claims processing system that will permit the disability claim manager to: gather and store claims information; develop both disability and nondisability evidence; share necessary facts in a claim with SSA medical consultants and specialists in nondisability technical issues; analyze evidence and prepare well-rationalized decisions on both disability and nondisability issues; and produce clear and understandable notices that accurately convey all necessary information to claimants.

The disability claim manager will be the focal point for claimant contacts throughout the claim intake and adjudication process. The disability claim manager will explain the disability program to the claimant; convey what the claimant will be asked to do, and what the claimant may expect from SSA during this process; and advise the claimant regarding the right to representation, including referral sources for representation, and community resources, including the names of organizations that could help the claimant pursue the claim. The goal will be to give claimants access to the decisionmaker and allow for ongoing, meaningful dialogue between the claimant and the disability claim manager.

The disability claim manager will conduct a thorough screening of the claimant's disability and nondisability eligibility factors. If the claimant appears ineligible for either disability program based on the claimant's allegations and evidence presented during the claim intake interview, the disability claim manager will explain this to the claimant. If the claimant decides not to file a claim, the disability claim manager will give the claimant an informal denial notice.

If the claimant decides to file, the disability claim manager will complete appropriate application screens from the automated claims processing and decision support system. Impairment-specific questions will assist the claims manager in obtaining information that is relevant and necessary to a disability decision. Based on the claimant's statements and the evidence that is available at that interview, the disability claim manager will determine the most effective way to process the claim. If the evidence is sufficient to decide the claim, the disability claim manager will take necessary

action to issue a decision and, if appropriate, effectuate payment. The disability claim manager will determine what additional evidence is required to adjudicate the claim and will take steps to obtain that evidence. The disability claim manager will decide whether to defer nondisability development (e.g., requesting SSI income and resource information, or developing DI dependents' claims) or do it simultaneously with development of the disability aspects of the claim.

Although the disability claim manager will be responsible for the adjudication of an initial claim, the claim manager will call in other staff resources, as necessary. With respect to disability decisionmaking, the disability claim manager will, in appropriate circumstances, refer claims to medical consultants to obtain expert advice and opinion. Similarly, other staff resources will be called upon for technical support in terms of certain claimant contacts and status reports; development of nondisability issues including auxiliary claims or representative payee issues; and payment effectuation. However, the disability claim manager will make final decisions on both the disability and nondisability aspects of the claim.

At the completion of the claims intake interview, the disability claim manager will issue a receipt to the claimant that will identify what to expect from SSA and the anticipated timeframes. It will also identify what further evidence or information the claimant has agreed to obtain. Finally, it will provide the name and telephone number of the disability claim manager for any questions or comments the claimant may have.

Certain third party organizations may be willing to provide a complete disability application package to SSA. Based on local management's assessment of service area needs and the availability of qualified organizations, SSA will certify third party organizations who are capable of providing a complete application package, including appropriate application forms and medical evidence necessary to adjudicate a disability claim. Using procedures agreed on with local management, the third party will submit claims for adjudication by a disability claim manager. The disability claim manager may elect to contact the claimant for the purpose of verifying identity or other claims-related issues, as appropriate. SSA will monitor such third parties to ensure that quality service is provided to claimants and to prevent fraud.

When the evidence does not support an allowance, the disability claim manager will provide the claimant an opportunity for a personal interview before issuing the initial denial determination. The interview will be in person, by videoconference, or by telephone, at the claimant's option and as the disability claim manager determines is appropriate under the circumstances. In appropriate circumstances, the predential interview may follow the initial intake interview. The purpose of the predential interview will be to advise the claimant of what evidence has been considered and to identify what further evidence, if any, is available that bears on the issues. If such further evidence exists, the disability claim manager will advise the claimant to obtain the evidence or, as appropriate, assist the claimant in obtaining it.

The initial disability determination will use a "statement of the claim" approach. The statement of the claim will set forth the issues in the claim, the relevant facts, the evidence considered, including any evidence or information obtained during the predential interview, and the rationale in support of the determination. The statement of the claim not only reflects the SSA commitment to fully explaining the basis for its action but also recognizes that claimants need clear information about the basis for the determination to make an informed decision regarding further appeal.

If government is to become customer-oriented, then managers closest to the citizens must be empowered to act quickly. Why must every decision be signed-off on by so many people? If program managers were instead held accountable for the results they achieve, they could be given more authority to be innovative and responsive.

Senator William V. Roth, Jr.
"Congressional Record,"
7/30/93

Much of the information that will provide the basis for the statement of the claim will be available on-line as part of the automated claims processing and decision support system. Adjudicators will create the statement of the claim and whatever supplementary information is necessary for a legally sufficient notice to the claimant based on the information in the decision support system. For allowance decisions, the statement of the claim will be more abbreviated than for denial decisions; however, it will contain sufficient information to facilitate quality assurance reviews and/or continuing disability reviews. The statement of the claim will be part of the on-line claim record and will be available to other adjudicators as the basis and rationale for the Agency action, if the claimant seeks further administrative review.

Disability Decision Methodology

SSA must have a structured approach to disability decisionmaking that takes into consideration the large number of claims SSA receives and still provides a basis for consistent, equitable decisionmaking by adjudicators at each level. The approach must be simple to administer, facilitate consistent application of the rules at each level, and provide accurate results. It must also be perceived by the public as straightforward, understandable and fair. Finally, the approach must facilitate the issuance of timely decisions.

Step 1 — Engaging in Substantial Gainful Activity

Any individual who is engaging in substantial gainful activity will not be found disabled regardless of the severity of the individual's physical or mental impairments. If a claimant is performing substantial gainful activity at the time a claim is filed, SSA will determine that the claimant is not disabled based on the demonstrated ability to engage in substantial gainful activity.

Under the new process, SSA will simplify the monetary guidelines for determining whether an individual (except those filing for benefits based on blindness) is engaging in substantial gainful activity. In making this determination, SSA will evaluate the work activity based on the earnings level that is comparable to the upper earnings limit in the current process (i.e., \$500). SSA will continue to exclude impairment-related work expenses in evaluating whether a claimant's earnings constitute substantial gainful activity. SSA will continue to use separate earnings criteria to evaluate the work activity of blind individuals as in the current process.

Step 2 — Medically Determinable Impairment

Under the new approach, SSA will consider whether a claimant has a medically determinable impairment, but will no longer impose a threshold severity requirement. Rather, the threshold inquiry will be whether the claimant has a medically determinable physical or mental impairment that can be demonstrated by acceptable clinical and laboratory diagnostic techniques. SSA will continue to evaluate the existence of a medically determinable impairment based on a weighing of all evidence that is collected, recognizing that neither symptoms nor opinions of treating physicians alone will support a finding of disability. Depending on the nature of a claimant's alleged impairments, SSA will consider the extent to which medical personnel other than physicians can provide evidence of a medically determinable impairment.

There will be an exception to the requirement that evidence include medically acceptable clinical and laboratory diagnostic techniques. This will occur when, even if SSA accepted all of the claimant's allegations as true, SSA still could not establish a period of disability. For instance, if a claimant describes a condition as one that will clearly not meet the 12-month duration requirement, (e.g., a simple fracture), SSA will deny the claim on the basis that even if the allegations were medically documented, SSA could not establish a period of disability.

Step 3 — Index of Disabling Impairments

If an individual has a medically determinable physical or mental impairment documented by medically acceptable clinical and laboratory techniques, and the impairment will meet the duration requirement, SSA will compare the claimant's impairment(s) against an index of disabling impairments. In contrast to the Listing of Impairments in the current regulations, the index will contain fewer impairments and have less detail and complexity. The index will describe impairments that will result in death or impairments that are so debilitating that any individual would be unable to engage in substantial gainful activity regardless of any reasonable accommodations that an employer might make in accordance with the Americans with Disabilities Act.

The index will function to quickly identify severely disabling impairments; the index will not attempt to describe ideal medical documentation requirements for each and every body system as occurs with the current Listings. The index will not attempt to measure the functional impact of an impairment on the individual; functional impact will be considered at Step 4 in the process. The index will be simple enough so that laypersons will be able to understand what is required to demonstrate a disabling impairment in the index. Additionally, SSA will draw no inferences or conclusions about the effect of a claimant's impairments on his or her ability to function merely because a claimant's impairment(s) does not meet the criteria in the index. Finally, SSA will no longer use the concept of "medical equivalence" in relation to the index, as it now uses in applying the Listing of Impairments.

Step 4 — Ability to Engage in Any Substantial Gainful Activity

In the final step in determining disability, SSA will consider whether an individual has the ability to perform substantial gainful activity despite any functional loss caused by a medically determinable physical or mental impairment. SSA will define the physical and mental requirements of substantial gainful activity and will measure as objectively as possible whether an individual meets these requirements.

SSA will develop, with the assistance of the medical community and other outside experts from public and private disability programs, standardized criteria which can be used to measure an individual's functional ability. Functional assessment instruments will be designed to measure, as objectively as possible, an individual's abilities to perform a baseline of occupational demands that includes the principal dimensions of work and task performance, including primary physical, neurophysical, psychological, and cognitive processes. Examples of task performance include, but are not limited to: physical capabilities, such as sitting, standing, walking, lifting, pushing, pulling; mental capabilities, such as understanding, carrying out, and remembering simple instructions; using judgment; responding appropriately to supervisors and co-workers in usual work situations; and responding appropriately to changes in the routine work setting; and postural and environmental limitations.

SSA will be primarily responsible for documenting functional ability using the standardized measurement criteria. In the near term, SSA will solicit functional information from treating medical sources, other nonmedical sources, and from claimants in a manner that is similar to the current process. In the future, the standardized measurement criteria will be widely available and accepted so that functional assessments may be performed by a variety of medical sources, including treating sources. The SSA goal will be to develop functional assessment instruments that are standardized, that accurately measure an individual's functional abilities and that are universally accepted by the public, the advocacy community, and health care professionals. Ultimately, documenting functional ability will become the routine practice of physicians and other

health care professionals, such that a functional assessment with history and descriptive medical findings will become an accepted component of a standard medical report.

SSA will use the results of the standardized functional measurement in conjunction with a new standard that SSA will develop to describe basic physical and mental demands of a baseline of work that represents substantial gainful activity and that exists in significant numbers in the national economy. SSA will conduct research and, working in conjunction with outside experts, will specifically identify the activities that comprise a baseline of occupational demands needed to perform substantial gainful activity. In the current process, an example of comparable "baseline" criteria are the functional requirements of unskilled, sedentary work. In establishing the functional activities that comprise an appropriate baseline of occupational demands, SSA will ensure that: 1) the functional activities are a realistic reflection of the demands of occupations that exist in significant numbers in the national economy; 2) the occupations are those that can be performed in the absence of prior skills or formal job training; and 3) the baseline of occupational demands that becomes the standard for evaluating the ability to perform substantial gainful activity considers any reasonable accommodations that employers are expected to make under the Americans with Disabilities Act.

*You do get to see someone
after you're denied twice.*

*That's when you get to see the
judge. The third time's a
charm. That's when you see
the decisionmaker.*

General Public Focus
Group Participant
Denver, 12/02/93

The statute recognizes that age should be considered in assessing disability on the assumption that the ability to make a vocational adjustment to work other than work an individual has previously done may become more difficult with age. In determining the impact of age, recognition should be given to the changes that occur with each succeeding generation. Accordingly, in the new process, SSA will establish age criterion in relation to the full retirement age. The full retirement age will gradually increase over time, based on the recognition that succeeding generations can expect to remain in the workforce for longer periods than the preceding generation.

In applying age criterion under the new process, an individual who falls within the prescribed number of years preceding the full retirement age will be considered as "nearing full retirement." In establishing what the prescribed number of years should be, SSA will conduct research and consult with outside experts on the relationship between age and an individual's ability to make vocational adjustments to work other than work the individual has done in the recent past. SSA will rely on the age of the individual in relation to the full retirement age to decide which of two decision paths to follow:

- 1) For an individual who is not nearing full retirement, SSA will compare the individual's functional abilities against the functional demands of the baseline work. The ability to perform the baseline work will represent a realistic opportunity to perform substantial gainful activity that exists in significant numbers in the national economy and a finding of disability will not be appropriate. However, anyone, regardless of age, who cannot perform the baseline work will be considered unable to engage in substantial gainful activity, and a finding of disability will be justified. The range of work represented by less than the baseline will be considered so narrow that despite any other favorable factors, such as young age or higher education or training, an individual would not be expected to have a realistic opportunity to perform substantial gainful work in the national economy.
- 2) For individuals who are nearing full retirement, SSA will compare the individual's functional abilities against the functional demands of the individual's previous work. Individuals nearing full

retirement age can not be expected to make a vocational adjustment to work other than work they have performed in the recent past. However, consistent with the statute, if an individual, even one nearing full retirement age, is capable of performing his or her previous work, SSA will find that the individual is not disabled. For those individuals who have no previous work, SSA will compare the individual's functional abilities to the baseline work, and a finding of not disabled will be appropriate if the individual is capable of performing the baseline work.

SSA will continue to rely on medical consultants to provide expert advice and opinion regarding medical questions and issues that will arise in deciding disability claims. Disability adjudicators at all levels of the administrative review process will call on the services of medical consultants to interpret medical evidence, analyze specific medical questions, and provide expert opinions on existence, severity and functional consequences of medically determinable impairments. If a medical consultant is called on to offer expert advice and opinion, the medical consultant will provide a written analysis of the issues and rationale in support of his or her opinion. The written analysis will be included in the record and will be considered with the other medical evidence of record by disability adjudicators at all levels of administrative review. Additionally, medical consultants will assist in the training of other consultants and disability adjudicators; contact other health care professionals to resolve medical questions on specific claims; conduct public relations and training with the medical community; and participate in SSA quality assurance efforts.

The disability decision methodology for childhood claims will consist of four steps that are based on the statutory definition of disability and that mirror the adult approach. SSA will evaluate whether the child is engaging in substantial gainful activity; whether the child has a medically determinable physical or mental impairment that will meet the duration requirement; and whether the child has an impairment that meets the criteria in the index of disabling impairments.

SSA will also develop, with the assistance of the medical community and educational experts, standardized criteria which can be used to measure a child's functional ability. These functional assessment instruments will be designed to measure, as objectively as possible, a child's abilities to perform a baseline of functions that are comparable to the baseline of occupational demands for an adult. Finally, SSA will conduct additional research to specifically identify a skill acquisition threshold to measure broad areas required to develop the ability to perform substantial gainful activity.

Evidentiary Development

SSA's ability to provide timely and accurate disability decisions depends to a significant degree on the quality of medical evidence it can obtain and the speed with which it can obtain it. The medical evidence collection process accounts for a considerable portion of the total time involved in processing disability claims.

Traditionally, the procurement of medical evidence has involved multiple, often repetitive, requests for information from a variety of health care providers. Health care providers believe that these requests burden them with far too much paperwork and offer far too little in the way of compensation for the time invested. Conversely, adjudicators often find that this evidence is primarily treatment-oriented and fails to provide the highly specialized clinical information required by the current Listings, or the functional information that is frequently necessary at various points in the disability decision-making process. The goals of the evidence collection process will be to focus requests for evidence on the critical diagnostic and functional assessment

information necessary for a disability decision and to form a new partnership with the sources of this information so that it can be obtained in the most efficient, cost-effective manner.

SSA will give primary emphasis to obtaining medical information from treating sources by way of brief, but specific, diagnostic information regarding an individual's medically determinable impairments and the functional consequences of those impairments. Treating source statements will include diagnostic information about a claimant's impairments, the clinical and laboratory findings which provide the basis for the diagnosis, onset and duration, response to treatment, and the functional limitations that can reasonably be linked to the clinical and laboratory findings. SSA will develop, in conjunction with the appropriate health care professionals and other public and private disability programs, standardized criteria which can be used to measure, as accurately and objectively as possible, an individual's functional ability. SSA will also seek health care providers' assistance in educating the medical community on the clinical application of these instruments. Once developed and universally accepted as the appropriate standard by the medical community, the standardized measurement criteria will be widely available.

SSA will develop a standardized form which effectively tailors the request for evidence to the specific diagnostic and functional assessment information necessary to make a disability decision. The form will permit treating sources to provide necessary diagnostic and functional assessment information on a single document. In appropriate circumstances, SSA will accept a treating source's statement on the standardized form as to these issues without resorting to the traditional, wholesale procurement of actual medical records. Depending on the nature and extent of an individual's impairments and treating sources, statements from multiple medical sources may be appropriate. In completing standard forms, treating sources will certify that they have in their possession the medical documentation referred to in the statement and that said documentation will be promptly submitted at the request of SSA. SSA will monitor treating source completion of the standardized forms and verify evidence when appropriate.

SSA will acknowledge the value of treating source information by establishing a national fee reimbursement schedule for medical evidence. Additionally, the fee reimbursement schedule will utilize a sliding-scale mechanism to reward the early submission of medical information. A national, sliding-scale fee schedule will provide incentives for treating sources to cooperate in the evidentiary development process and invest quality time to provide medical certifications on behalf of their patients. SSA will focus professional educational efforts and medical relations outreach at the local and/or regional level to ensure that treating sources are kept informed of program requirements and made aware of specific evidentiary needs or problems as they arise in the adjudication process.

If a claimant has no treating source, or a treating source is unable or unwilling to provide the necessary evidence, or there is conflict in the evidence that can not be resolved through evidence from treating sources, SSA will refer the claimant for an appropriate consultative examination. Because the standardized measurement criteria for assessing function will be widely available, consulting sources will be able to perform functional assessments that, in the absence of adequate treating source information or where there are unresolved conflicts in the evidence, will be considered probative evidence. Depending on the service area, SSA will consider contracting with large health care providers to furnish consultative examinations for a specified geographic location.

As part of an ongoing training and medical relations program, SSA will ensure that providers of consultative examinations are provided adequate training on disability requirements, both initially and as program changes occur.

Administrative Appeals Process

The administrative appeals process will be simplified to increase the accessibility of the process. The public perceives multiple, mandatory appeal steps as obstacles to receiving timely, fair, and accurate decisions. SSA will reduce the number of mandatory appeals steps to promote more timely decisions and to ensure that claimants do not inappropriately withdraw from the claims process based on a perception that it is too difficult or time-consuming to pursue their appeal rights. Claimants will be able to fully participate in the administrative appeals process with or without a representative. The decision whether to appoint a representative will remain with the claimant and SSA will neither encourage nor discourage claimants in seeking representation.

The initial disability determination will use a "statement of the claim" approach which will be part of the on-line claim record and will stand as the basis and rationale for the Agency action, if the claimant seeks further administrative review. SSA will standardize claim file preparation and assembly, including the use of appropriate electronic records, at all levels of administrative process until such time as the claims record is fully electronic.

Because the initial determination will be the result of a process that ensures fully developed evidentiary records and ample opportunity for the claimant to personally present additional evidence prior to an adverse determination, there will be no need for any intermediate appeal (e.g., reconsideration) prior to the ALJ hearing. If the claimant disagrees with the initial determination, the claimant may, within 60 days of receiving notice, request an ALJ hearing.

If a claimant decides to request an ALJ hearing, an adjudication officer will conduct an interview in person, by telephone, or by videoconference, and become the primary point of contact for the claimant. The adjudication officer will be the focal point for all prehearing activities but will be expected to work closely with the ALJ, medical consultants and the disability claim manager, when appropriate.

The adjudication officer will explain the hearing process; advise the claimant regarding the right to representation; provide the appropriate referral sources for representation; give the claimant, where appropriate, copies of necessary claim file documents to facilitate the appointment of a representative; and encourage the claimant to decide about the need for and choice of a representative as soon as is practical.

The adjudication officer will also identify the issues in dispute and whether there is a need for additional evidence. If the claimant has a representative, the representative will have the responsibility to develop evidence. The adjudication officer will also conduct informal conferences with the representative, in person or by telephone, to identify the issues in dispute and prepare written stipulations as to those issues not in dispute. If the claimant submits additional evidence, the adjudication officer may refer the claim for further medical consultation, as appropriate. The adjudication officer will have full authority to issue a revised favorable decision if the evidence so warrants. If the adjudication officer issues a favorable decision, the adjudication officer will refer the claim back to the disability claim manager to effectuate payment.

The adjudication officer will consult with the ALJ during the course of prehearing activities, as necessary and appropriate to the circumstances in the claim. As a preliminary matter, the adjudication officer will also set a date for the hearing that is 45 days after the hearing request. The adjudication officer may exercise discretion in establishing an earlier or later hearing date.

depending on the individual circumstances. Electronic access to ALJs' calendars will facilitate timely scheduling of hearings. The adjudication officer will refer the prepared record to the ALJ only after all evidentiary development is complete and the claimant or a representative agrees that the claim is ready to be heard.

The ALJ hearing will be a *de novo* proceeding in which the ALJ considers and weighs the evidence and reaches a new decision. A *de novo* hearing is consistent with the role of an ALJ envisioned under the Administrative Procedure Act. Under that scheme, the ALJ is an independent decisionmaker who must apply an agency's governing statute, regulations and policies, but who is not subject to direction and control by the agency with respect to the decisional outcome in any individual claim. At the same time, the Administrative Procedure Act ensures that an ALJ's decision is subject to review by the agency, thus giving the agency full power over policy.

A hearing before an ALJ will remain an informal adjudicatory proceeding as it is under the current process. An informal, nonadversarial proceeding is consistent with the public's strong preference for a simple, accessible hearing process that permits, but does not require, an attorney. An informal process facilitates the earlier and faster resolution of the issues in dispute, thus promoting more timely decisions.

Our task is not to fix blame for the past but to fix the course for the future.

President John F. Kennedy

The ALJ will still have a role in protecting both SSA interests and the claimant's interests, particularly when the claimant is unrepresented. The ALJ will retain the authority and ability to develop the record. An improved initial determination process with its focus on early and comprehensive evidentiary development, predenial personal conferences, fully rationalized initial decisions, and prehearing analysis of contested issues should ensure that the Agency position is fully explored and presented to the ALJ. Moreover, the primary burden of compiling an evidentiary record will be shifted to the representative—if one is appointed—or to the claimant (when able to do so), with assistance (when appropriate), from SSA personnel.

Adjudication officers and other decision writers will assist ALJs in preparing hearing decisions, using the same decision support system that supports the preparation of initial disability determinations. A simplified disability decisional methodology, in conjunction with the use of prehearing stipulations that frame the issues in dispute, will result in shorter, more focused hearing decisions. If the ALJ issues a favorable decision, he or she will refer the claim back to the disability claim manager to effectuate payment.

Under the new process, if a claimant is dissatisfied with the ALJ's decision, the claimant's next level of appeal will be to Federal district court. A claimant's request for Appeals Council review will no longer be a prerequisite to seeking judicial review.

As under the current process, the Appeals Council will continue to have a role in ensuring that claims subject to judicial review have properly prepared records and that the Federal courts only consider claims where appellate review is warranted. Accordingly, the Appeals Council, working with Agency counsel, will evaluate all claims in which a civil action has been filed and decide, within a fixed time limit whether it wishes to defend the ALJ's decision as the final decision of the Secretary. If the Appeals Council decides to review a claim on its own motion, it will seek voluntary remand from the court for the purpose of affirming, reversing or remanding the ALJ's decision. Favorable Appeals Council decisions will be returned to the disability claim manager to effectuate payment.

Additionally, the Appeals Council will have a role in a comprehensive quality assurance system. As part of this system, the Appeals Council will also conduct own motion reviews of ALJ decisions (both allowances and denials) prior to effectuation. If the Appeals Council decides to review a claim on its own motion, the Appeals Council may affirm, reverse or remand the ALJ's decision. The Appeals Council's review will be limited to the record that was before the ALJ.

Quality Assurance

SSA will have a comprehensive quality assurance program that defines its quality standards, continually communicates them to employees in a clear and consistent manner, and provides employees with the means to achieve them. SSA will devote resources to building quality into the system of adjudication to ensure that the right decision is made the first time. SSA will also systematically review the quality of the overall system of adjudication to ensure the integrity of the administrative process and promote uniform application of agencies policies nationally. Finally, SSA will measure customer satisfaction against the SSA standards for service.

SSA's ability to ensure that the right decision is made the first time depends on a well-trained, competent, and highly motivated workforce that has the program tools and technological support to issue quality decisions. SSA will make an investment in comprehensive employee training to ensure that employees have the necessary knowledge and skills to perform the duties of their positions. SSA will develop national training programs for initial job training and orientation as well as continuing education to maintain job knowledge and skills. National training programs will also address changes to program policy. Continuing education opportunities will also be made available to employees to enhance current performance or career development. SSA will ensure that employees are given sufficient time and opportunity to complete the required continuing education.

Employees, other than ALJs (because of Administrative Procedure Act limitations), who complete initial training and pass a set of performance evaluations based on national quality standards will receive a certificate of competence. This certificate will attest that the employee has successfully completed both initial training and a probationary period on the job. Certification will be renewed yearly upon successfully completing required training and having no less than a fully satisfactory performance rating. Those employees not certified initially or renewed will be provided an improvement plan with goals and time targets for improved performance.

In addition to formal program training, SSA will rely on a streamlined and targeted system of in-line quality reviews and monitoring of adjudicative practices. The elements include a mentoring process for new employees and peer review for experienced employees. SSA will encourage peers to discuss difficult claims or issues and resolve them informally whenever possible. As part of this process, managers will be expected to oversee the adjudication process. The goal of these reviews is to provide immediate, constructive feedback on identified errors to reduce or eliminate their possible recurrence.

To ensure that adjudicators have the necessary program tools to issue accurate decisions, SSA will use a single mechanism for the presentation of all substantive policies used in determining eligibility for benefits. Additionally, an integrated claims processing system will provide the necessary technological support for adjudicators at all levels of the administrative process. The claim processing system will facilitate the preparation of accurate decisions by providing on-line editing capacity to identify errors in advance and decision support software to assist in analysis and decisionmaking.

Another component of quality assurance is an integrated system of national post-adjudicative monitoring to ensure the integrity of the administrative process and to promote national uniformity in the adjudication of disability claims. This system will include comprehensive review of the whole adjudicatory process including both disability and nondisability issues, allowances and denials, and at all levels of decisionmaking. The review will focus on whether accurate decisions were made at the first possible step in the process. Reliance on an integrated claim processing system will facilitate the selection of a statistically valid sample of claims for this review. SSA will use the results from these end-of-line reviews to identify areas for improvement in policies, processes or employee education and training. SSA will also use the results to profile error-prone claims with the goal of preventing errors at the front end.

To measure whether SSA has met or exceeded the public's service expectations, SSA will conduct customer surveys and periodic focus groups to determine the public's views on the quality of SSA service. SSA will also survey legal representatives and third parties who provide assistance or act on claimants' behalf in dealing with SSA. SSA will also seek employee feedback on how well SSA has met their expectations. Employee feedback will be sought on a wide array of issues including Agency goals and performance indicators, training and mentoring needs, and the quality of operating instructions.

SSA's management information will be revised to assess the performance of the Agency as a whole in providing service to claimants for disability benefits. Management information regarding the contributions at each step in the process to the final product, as well as to the work product passed on to other steps will be available. Meaningful, timely management information will be facilitated by a seamless claim processing system with a common database that is used by all individuals who contribute to each step in the process. Other measures, such as cost, productivity, pending workload, and accuracy will be developed or revised to assess the performance of the Agency as a whole and the participants in the process who contribute to this performance. Measurements for public awareness, as well as claimant and employee satisfaction will add to this assessment.

Teamwork and Workforce Enrichment

The teamwork concept is a fundamental ingredient in the new process. The disability claim manager will be the focal point at the initial claim level, assisted by technical and medical support staff. The adjudication officer will be the focal point at the prehearing level, relying on technical and medical support staff, and interacting with the disability claim manager and the ALJ. The ALJ will be the focal point at the hearing level, receiving support from technical and medical support staff, and interacting with the adjudication officer and disability claim manager.

Employees involved with the initial level of claims will perform multiple tasks instead of narrow activities, expanding their roles to encompass more of the "whole" job, and enabling them to experience the direct relationship between their actions and the final product. Those at the prehearing step will also do more of the "whole" job, including taking action to allow claims much earlier in the process. For medical consultants and ALJs, tasks not commensurate with professional skill levels, will be eliminated.

Next Steps

The recommendations in this report represent the Team proposal to SSA for reengineering the disability process; this is not a final SSA proposal. The Commissioner of SSA asks interested parties to comment on the proposal within the next 60 days. The Team looks forward to receiving comments from the community concerned with the delivery of disability benefits.

Summary of Differences

	CURRENT PROCESS	NEW PROCESS
PROCESS ENTRY	<ul style="list-style-type: none"> ■ Claimant has limited or no program information available prior to entry. ■ Claimant files by mail, telephone, or in-person 	<ul style="list-style-type: none"> ■ Claimant has program information, starter application and means to gather evidence before entry ■ Claimant files by mail, electronically, telephone or in-person
CLAIMS INTAKE	<ul style="list-style-type: none"> ■ Interview with claims representative trained only in nondisability aspects of program ■ Multiple contacts with different claims specialists 	<ul style="list-style-type: none"> ■ Interview with claim manager trained in disability and nondisability aspects of program ■ Single point of contact for all claims processing
DISABILITY DECISION METHODOLOGY (Adult)	<ul style="list-style-type: none"> ■ 5-step sequential evaluation: <ul style="list-style-type: none"> — Engaging in substantial gainful activity — Severe impairment — Meets or equals the Listings of Impairments — Able to do past relevant work — Able to do other work (using the "Grid") 	<ul style="list-style-type: none"> ■ 4-step approach: <ul style="list-style-type: none"> — Engaging in substantial gainful activity — Medically determinable impairment — Impairment is in Index of Disabling Impairments (No medical equivalence or assessing function) — Able to perform substantial gainful activity ("Grid" eliminated)
DISABILITY DECISION METHODOLOGY (Child)	<ul style="list-style-type: none"> ■ 4-step sequential evaluation: <ul style="list-style-type: none"> — Engaging in substantial gainful activity — Severe impairment — Meets or equals Listings of Impairments — Comparable severity 	<ul style="list-style-type: none"> ■ 4-step approach: <ul style="list-style-type: none"> — Engaging in substantial gainful activity — Medically determinable impairment — Impairment is in Index of Disabling Impairments (No medical equivalence or assessing function) — Comparable severity
EVIDENTIARY DEVELOPMENT	<ul style="list-style-type: none"> ■ SSA takes responsibility for obtaining medical evidence ■ SSA obtains detailed clinical and laboratory findings in all claims ■ SSA uses objective findings, medical opinion, and other evidence to assess a claimant's residual functional capacity 	<ul style="list-style-type: none"> ■ Claimant is a partner in obtaining medical evidence ■ SSA obtains evidence necessary to decide issues in the claim ■ SSA, working with medical experts, develops standardized instruments and criteria for measuring a claimant's functional ability

	CURRENT PROCESS	NEW PROCESS
INITIAL DISABILITY DETERMINATION	<ul style="list-style-type: none"> ■ Disability specialist and physician team decide claim based on paper review 	<ul style="list-style-type: none"> ■ Claim manager decides claim after appropriate consultation with physician ■ Claimant has opportunity for personal predecision interview
RECONSIDERATION	<ul style="list-style-type: none"> ■ Paper review by different disability specialist and physician team 	<ul style="list-style-type: none"> ■ Reconsideration eliminated
ADMINISTRATIVE LAW JUDGE HEARING	<ul style="list-style-type: none"> ■ Hearing request must be filed within 60 days of reconsideration ■ ALJ is responsible for overseeing all prehearing development ■ Prehearing conference is held in limited circumstances 	<ul style="list-style-type: none"> ■ Hearing request must be filed within 60 days of initial determination. ■ Adjudication officer oversees prehearing development ■ Personal conference is mandatory if claimant is represented
APPEALS COUNCIL REVIEW	<ul style="list-style-type: none"> ■ Claimant requests Appeals Council review and the Appeals Council may consider new evidence ■ Appeals Council action is a prerequisite for judicial review 	<ul style="list-style-type: none"> ■ Appeals Council reviews claim only on its own motion; review is limited to the record before the ALJ ■ Appeals Council action is not a prerequisite for judicial review
QUALITY ASSURANCE	<ul style="list-style-type: none"> ■ Quality measurements focus primarily on end-of-line disability decision accuracy; quality is not consistently measured at all levels of administrative review 	<ul style="list-style-type: none"> ■ Quality assurance will address customer satisfaction, employee education/performance, and error prevention; end-of-line reviews will measure quality of the entire adjudicative process
PROCESS INTEGRITY	<ul style="list-style-type: none"> ■ Adjudicative standards and policies are available through a variety of instructional vehicles ■ Consistent training is not provided to disability decisionmakers 	<ul style="list-style-type: none"> ■ A single policy book will be used by all adjudicators at all levels of administrative review ■ Ongoing training will be provided to all disability decisionmakers and support personnel

Chairman JACOBS. Thank you, Dr. Chater.

Mr. Bunning.

Mr. BUNNING. Thank you, Mr. Chairman.

Dr. Chater or Ms. Davis, regarding the new position of disability claims manager, I guess that both disability examiners and claims representatives would be candidates for that new position. Will that involve a lot of training and retraining, or won't it?

Ms. CHATER. We anticipate, of course, that there would be a whole lot of retraining necessary. But it is not as though we would be starting from scratch, because the claims representatives and the DDS examiners are already doing much of the process. Because they have been involved in the development of the proposal, they are very eager and enthusiastic about their suggestions and are looking forward to having perhaps more responsibility in the process.

So, yes, it would require much more training, and we would plan for that. But it is not as though we would be starting with people who have no experience. We have a very, very dedicated and educated work force.

Mr. BUNNING. Many of today's witnesses, and there are quite a few, are critical of the new simplified disability determination proposal. But I assume that is a critical element, if the decision is to be made on the frontline. Is that accurate?

Mr. CROFT. Yes, it is a critical element. A lot of other elements in the proposal stem from the simplified decisional methodology, including having the frontline employees make fair and equitable decisions. So, yes, that is correct.

Mr. BUNNING. I would expect the allowance rates to go up for initial claims, given the face-to-face initial interview and predenial conferences. How do you plan to monitor those cases for accuracy?

Mr. CROFT. We propose a three-pronged quality assurance process in our new design. First of all, we intend to make the decision right the first time, train people properly in how to do the job, and provide them with the tools that they need to do the job. Second, we will have inline quality reviews done on the jobsites, and third, we will have a measurement system at the end to make sure the process is working.

Mr. BUNNING. If quality assurance questions a specific case, will it be reopened?

Mr. CROFT. Yes, it would be reopened. We are building in an inline quality review system, so as far as reopening or not reopening, that is an issue after the fact. We did not get into the mechanisms of how cases would be reopened if error was found in the postadjudicative review, but certainly it was discussed in our team deliberations, and that would be our intent.

Mr. BUNNING. In reference to the first chart that Dr. Chater showed us on cost, how much is this going to cost in relationship to the expenditures that you are now making as far as the disability claims are concerned? In other words, the proportional share that you have allocated?

Ms. CHATER. We are looking for significant improvement by at least 1997 in terms of our implementation. But we did not do a cost-benefit analysis for the proposal. That is a level of analysis that will have to be done for the decisions that we make on the pro-

posal this summer. But given the conceptual level of this proposal, we could not give you a dollar and cents answer today.

Mr. BUNNING. But we know what the present system costs.

Ms. CHATER. Yes.

Mr. BUNNING. We ought to have some idea what the proposal that you are putting forth is going to cost. Or are you waiting until the final plan is put into place to cost it out?

Ms. CHATER. Well, let me respond to that, if I might. We know that we cannot expect any additional funds for the remaining part of fiscal year 1994, and our fiscal year 1995 budget has already been submitted. But part of our submittal for budgets in the past has been to automate our computer system so that we have a network that connects everybody, and we are looking forward in the long-term future to having a paperless agency or as near as possible to a paperless agency, where we can take claims by computer and save an enormous amount of worktime in doing that.

So the plan we have in place for our automation is really a plan that enables us to fund some of the things that are written into the proposal, and we will continue to work with that.

The other answer I would give you, Mr. Bunning, is that it is a question of reallocation. I am so determined to make this proposal operational in a very effective way, that we are looking very, very hard within our budget to see what we might reallocate from one series of plans to another. For example, in dealing with the training question, we know we would have to spend a lot of money for training to implement any redesign, but we also do training now.

As I look at our training projects, the courses offered and the in-service education we have now focus on specific subjects and specific kinds of task-oriented conferences. We will turn that around and move that money and those training resources into our reengineered program, so that we have a different kind of training, but we will be able to use some of the same resources.

Mr. BUNNING. The reason I am getting to the dollars and cents part is the fact that the Social Security Administration came to us and asked for specific dollars for specific things. Congress, as Congressman Pickle brought out in the last subcommittee hearing, allocated x dollars for specific programs that went to the Social Security Administration, but were not used for those programs.

So if you are going to come to us and ask for specific money for a specific program, we told you the last time you were here that we are a little reluctant to spend money that way and allocate it for a specific program, unless it is spent for a specific program.

Ms. CHATER. Mr. Bunning, I was not here at that last hearing, but I did read the testimony and I know your concern, and I appreciate it.

You gave to us \$320 million for a disability reinvestment fund, and we are in fact using that money and plan to continue using that money for short-term disability improvements. We have many, many short-term initiatives in progress now just to help deal with our present claimants and also the workload backlogs. It is true that we had to use funds within the President's base appropriation request to fund congressionally mandated locality pay increases. However, I want you to know that we are very much involved in

our reinvestment program for automation and have in place some short-term projects that would benefit the disability process.

Mr. BUNNING. Dr. Chater, I am not going to get into a dispute with you on how the money was spent, but it was not spent as Congress allocated it to you. And for the purpose, if you wanted to give people increases in their salaries, that was a decision that was up to the Social Security Administration, but that money that we sent you was not for that purpose. I am not going to get into a dispute with you over it. That is just a fact. It was brought out by Congressman Pickle, and I happen to agree with it.

Thank you, Mr. Chairman.

Chairman JACOBS. Mr. Houghton.

Mr. HOUGHTON. Thank you, Mr. Chairman.

Dr. Chater, Mr. Croft, Ms. Davis, it is nice to see you.

If I described to you an agency, let us call it the XYZ agency, that had a problem in dealing with its customers. It took 265 days to even get the process rolling. It said it was going to fix this problem by the year 1997, but it did not know what the costs were. It was probably using the same people that got us into the trouble in the first place. Would you be very happy with that situation?

Ms. CHATER. No, I would not, sir, except that this is not a plan yet. It is only a proposal for discussion at this point.

Mr. HOUGHTON. Would you like to elaborate on that, or would you like me to go on with my next question?

Ms. CHATER. I gather it is somewhat unusual to present a proposal without all of the details in place. But in terms of reengineering, we want to have ample opportunity to hear everyone's suggestions and comments about how to make this the best possible redesign. So, we opted for a proposal first that could lead us to a design that incorporated other people's comments and suggestions. That is all I can say to elaborate.

Mr. HOUGHTON. I guess I have sort of a gut feeling, and I have been around the barn a few times on situations like this. If an institution is in trouble, then there are plans and there are pilots in the reengineering and the restructuring and there are proposals and there are other plans and time elements, but I wonder if it gets to the core issue.

I never heard one mention of the people who were going to do this, the people who got us into trouble, of why they would be the people to get us out of trouble, the expertise they have, the driving force, the management skills which are going to do the job that you want.

Ms. CHATER. I do not believe that the process is in trouble because of the people. I believe the process is in trouble because we continued over long periods of time to use processes that were OK 40 years ago when they were put into place. But over time, as our workloads increased, we kept using the same processes, without much attention to redesigning or restructuring or reengineering any that were outdated. I cannot say that it is the people, because our SSA employees and the DDS folks are extraordinarily dedicated and very, very frustrated with the process. And as they have more cases to review and their workload has increased, despite all of that, they continue to do their best.

We are at the time now when we can no longer count on increased overtime. We are at a point where we cannot ask people to work more and more and more overtime. We really must do something, and this is our attempt to do something. I do not think it is the people, and I feel strongly about that.

Mr. HOUGHTON. Well, I do not mean the people in general, I mean the people managers. If I was working for you and I told you that we had a problem and that we were not sure how much it was going to cost to fix it, we were not sure we were going to be able to do it, it might be fixed in 1997, I am not sure that would be a satisfactory answer. Would you?

Ms. CHATER. No, I do not think that is a totally satisfactory answer.

Mr. HOUGHTON. Furthermore, there was an article by a fellow named Bob Meyers—and you probably saw this in the Seniors Coalition—

Ms. CHATER. Yes.

Mr. HOUGHTON [continuing]. That said that it is not only the administrative funds, but the administrative thrust which is going to be important here, not the reengineering, the reinventing, the restructuring, that is going to make the difference between something that works and something that does not work. How do you feel about that?

Ms. CHATER. I think that administrative leadership is key. I think it is very important that our managers, not just central office administration, but also our managers in our regional offices and our managers in our local offices, become involved in this project, have the training to carry it out and the willingness to be part of a new process.

Mr. HOUGHTON. Thank you very much, Mr. Chairman.

Chairman JACOBS. The Honorable Mr. Pickle.

Mr. PICKLE. Thank you, Mr. Chairman.

Dr. Chater, I simply want to comment on the use of the money for locality pay, instead of money used primarily on disability. I think it serves no purpose, first, to argue the point. You did ask for extra funds, and we gave you funds in addition to that primarily in an attempt to do something about disability. It was used for locality pay.

In my opinion, Social Security flaunted the intent of Congress. That is a shameful thing you did, because you did not concentrate on disability. Now, that has been done, we have expressed ourselves, and I will say we are more than concerned. We are going to be watching that closely in the next appropriation.

Now with respect to your proposal, I want to say to you that I think what you have proposed in this disability review program is a bold step. It is the first time in 10 years that I have seen Social Security actually move forward aggressively to do something specific in this field. The face-to-face determination, the elimination of reconsideration review, the establishment of a single set of policies for guidelines, those are good steps.

Now, I have a feeling, Dr. Chater, that you are going to be attacked by the advocacy groups, saying, "Oh, that is just a beginning step to keep people off the disability rolls." You will be hearing that cry. We all will. We have to expect that.

But, overall, these are good recommendations. They do not go far enough, in my opinion. You do not say anything about the backlog of cases on continuing disability review, as I read the statement. It is a problem. Here we have got 1 million people on it, and you talk about how you are going to have a new setup. We have got to find some way to attack this big backlog, and you do not mention that. Nor do you endorse the Social Security court that both the Chairman and Mr. Bunning has endorsed, and I think that ought to be part of the consideration.

Now, I am happy that you are making this step, but I do not think we have gone far enough in what we have to do. We must meet it, and I would say to you that your work is cut out for you.

Now, I have one or two questions for you. To do this, it is going to take more money. You know it. You told Mr. Bunning that you just do not know yet. I understand you have got a 60-day review period, and that is acceptable. After that, though, you will know what you are going to do, and once that decision is made, I think you ought to give this committee and we would expect you to give us what it would cost, would there be additional funding, and how you are going to handle it. I am going to assume that is a procedure that is agreeable to you. Is it?

Ms. CHATER. Absolutely, yes.

[The following was subsequently received:]

Further, in response to your statements regarding SSA's use of administrative funds for locality pay, attached for the record is a copy of my April 29, 1994 letter to you on this subject.



THE COMMISSIONER OF SOCIAL SECURITY
BALTIMORE, MARYLAND 21235

APR 29 1994

The Honorable J. J. Pickle
House of Representatives
Washington, D.C. 20515

Dear Mr. Pickle:

I am writing to follow up on our discussion of the Social Security Administration's (SSA) use of fiscal year (FY) 1994 administrative resources. I want to clarify, for the record, the facts surrounding our use of funds appropriated by the Congress for investment in FY 1994 disability case processing.

At the hearing on the proposal to reengineer the Social Security disability program you expressed concern that \$200 million added by Congress to SSA's FY 1994 appropriation request specifically for processing disability cases was used instead for employee pay raises. I want to assure you that the \$200 million has been allocated and is being used exclusively for processing disability cases.

The President's appropriation request for SSA for FY 1994 included \$120 million investment fund for the State Disability Determination Services (DDS) to address growing disability backlogs. Congress added \$200 million to the President's request to provide additional resources for processing disability workloads. The \$320 million add-on will allow us to process 438,500 more initial disability claims and conduct 55,600 more hearings than would otherwise have been the case. Of this total, we have allocated \$195 million to the DDSs and the remaining \$125 million for disability case processing by SSA employees.

Consistent with the President's budget proposal to postpone locality pay raises, SSA's appropriation request for FY 1994 did not include funding for such pay increases for its employees. However, the Congress did not accept the President's proposal, thus requiring Governmentwide locality pay increases averaging 3-4 percent effective January 1994 which had to be funded without any supplemental appropriations by the Congress. As you know, neither SSA nor any other agency of government is permitted under the law to withhold the locality pay increases from its employees. For SSA, the consequence of absorbing the \$66.5 million cost of locality pay in FY 1994 was a reduction (about 1,750 SSA workyears) in the amount of work we could fund

within the President's "base" appropriation request. This reduction is being applied to activities across the Agency, including disability-related activities. I want to emphasize that this reduction will not impact the investment fund. The additional workloads projected to be handled with the \$320 million investment will be achieved.

Without question, you and I share the same ultimate objectives -- to provide world class service to those dependent on Social Security and to meet our fiduciary responsibilities as stewards of the Social Security trust funds. I assure you that SSA will do all we can to achieve these mutual objectives as they relate to the disability programs.

A similar letter is being provided to Congressman Jim Bunning, and copies are being sent to Congressmen Bill Brewster, Philip Crane, Amo Houghton, Andy Jacobs, William Jefferson, and Mel Reynolds.

Sincerely,



Shirley S. Chater
Commissioner
of Social Security

Mr. PICKLE. When do you think you might be able to get your recommendations or the adoption of these recommendations, as well as the funds that you will be expected to need, or will you need them?

Ms. CHATER. We will have some cost estimates for you this summer.

Mr. PICKLE. I am a little bit uncomfortable on what is summer.

Ms. CHATER. How about July 1?

Mr. PICKLE. You have got the Texas summer, and that will be May. [Laughter.]

Well, we expect you to get it to us as quickly as you can, because we have got to do something about it. We have got 1 million people backlogged, and somehow we have got to reinstate the continuing disability reviews.

Everybody on this committee and everybody in this audience wants that money only to go to people who are disabled. We have got a serious problem in the disability field. I looked at a study made by David Cort of the CRS that shows the intense growth of the disability program. It has increased more than 50 percent, far greater than the population has increased. We are getting more and more people on the rolls. And this study is tremendously important to show the rapid and the alarming growth in this program.

We want money only to go to people who are disabled. We have got to get the people off the rolls who are not disabled. And the pity of the good program is that you get on the rolls and you stay on the rolls forever, by and large. There is not 1 out of 100 that are ever taken off the rolls. Now, that is not good for that individual, probably the worst thing to happen to him, to get on Social Security and ride it through life. That keeps him from being a productive citizen, by and large. We have got to prevent that, and somehow we have got to take care of this backlog.

Now, let me ask you one other question. In the new program, we probably will require the individual to furnish more medical evidence. We have been relying a great deal on Social Security having to get that. Will that establish a new program, a new industry of people that claimants have to rely on to get this medical evidence? Do you or Dr. Davis want to comment on that? Will it be a new program? Will it be a new growth, or will Social Security just say we are going to get out of that program?

Ms. DAVIS. It will not be a new program. What we are saying in our proposal is that we have seen in projects across the country, that when we help an individual understand what we will need from their treating physician, that individual can in many cases get that information from their treating physician a lot faster than we can. For those people who can do that, we will encourage them to do that. Other people, as we do today, who need more help getting medical evidence, we will continue to help.

Mr. PICKLE. Well, the shift of responsibility pretty much does require the individual to furnish the evidence that they will be expected to give, wouldn't it?

Ms. DAVIS. I would not say it is a shift of responsibility. I would characterize it as saying that there are a lot of claimants who told us, as we did our review, that they felt very frustrated, because the

process takes over and they cannot help themselves, and they want to.

Mr. PICKLE. Mr. Chairman, I want to again say to Dr. Chater that I am proud to see Social Security making these recommendations. By and large, I hope they are adopted, in essence, and that you go forward and extend it, to get into the disability review program and look at these Social Security court cases. These are good recommendations and I am glad you have shown that leadership. I want you to continue, and we are going to be watching.

Ms. CHATER. Thank you.

Mr. PICKLE. Thank you, Mr. Chairman.

Chairman JACOBS. Mr. Brewster, when does summer come in Oklahoma?

Mr. BREWSTER. I live about 15 miles north of Texas, so it is in May. [Laughter.]

Thank you, Mr. Chairman. I certainly appreciate the opportunity to visit a little bit about this subject today. I think the disability determination process is something that must be looked at. The disability determination program is taking far too long to determine if someone is disabled or if they are not. I have had numerous constituents die before it was ever determined that they were disabled. We have got to move more quickly. I commend you on reexamining the process to see if we can reengineer it and do it better.

As Mr. Pickle mentioned, there is a great feeling across the country that there are probably far too many on there than should be. But that does not change the determination process. We must move the process forward as quickly as possible.

Now, you say that you would plan to have your proposal ready by July 1, am I correct?

Ms. CHATER. I will have the team's final proposal by July 1.

Mr. BREWSTER. If your proposal was approved and moved forward, when would implementation take place?

Ms. CHATER. We plan to have some of the approved redesign ready to be implemented in the fall, this coming fall. We are looking at parts of the proposal now and we are doing studies in some of our offices to see how certain pieces of the process would work. Some of that has been ongoing for the last month, so we have a pretty good idea about what is working in some places.

Some parts of the proposal that would not require a change in legislation or regulations could be implemented by fall. For those parts of the proposal that would require a change in regulation or legislation, we would notify you and come to you for your advice and help in enacting the legislation as speedily as possible.

Mr. BREWSTER. Will you have an idea of the cost of your proposal on July 1, also?

Ms. CHATER. We will certainly have some cost analysis of the team's proposal for you by July 1, yes.

Mr. BREWSTER. Out of curiosity, I do not know if you would have the numbers available, but I would hope that you would get them. What percent of the budget for disability goes for salaries, paperwork and administration?

Ms. CHATER. I do not have it in my book, but I will certainly furnish it to you.

Mr. BREWSTER. When it is convenient, I would appreciate if you would get those numbers to me.

Ms. CHATER. We will do that, Mr. Brewster.
 [The following was subsequently received:]

The \$2.5 billion spent in fiscal year 1993 on administration of Social Security and SSI disability claims and appellate workloads was distributed between SSA and State components as follows:

About 60 percent of the \$2.5 billion covered:

- the salaries and other personnel compensation for SSA employees who directly process initial disability claims and appellate workloads in field offices, hearing offices, processing centers, etc.;

- the disability programs' share of salaries and other personnel compensation costs for SSA central/regional office staff supporting those programs through policy-making, quality assurance, and other oversight activities; and

- the disability programs' share of nonpersonnel SSA "overhead" costs, including rent, supplies, equipment, and purchase of medical evidence that SSA offices need to make determinations.

The remaining 40 percent covered the costs of State disability determination services (DDSs) that make disability determinations on behalf of the Secretary, including the costs of DDS salaries/other personnel compensation, purchase of medical evidence, rent, supplies, equipment, etc.

Mr. BREWSTER. I think whether a person is disabled or not disabled, the determination process, the expediency of getting it done is extremely important. We have many people who pay into Social Security all their worklife and, through no fault of their own, become disabled in their late forties or early fifties. They and their employer have paid into it, and yet it may be 1, 2, or 3 years before they can get anything as far as disability determination done, and that person is in a critical financial bind through no fault of their own. So the expedient determination is very important, and I commend you on starting the process to try to make it better.

Ms. CHATER. Thank you, sir.

Mr. BREWSTER. Thank you, Mr. Chairman.

Chairman JACOBS. Dr. Chater, one question comes to mind, and it comes to my mind because one of the staffers put it there. It was last night, so at least I remembered. [Laughter.]

In the case of the manager, greater training is going to be required and broader knowledge is going to be needed. I think some of the people from DDS may raise the question, is any one individual capable of mastering a broad enough range of factors in order to carry out that position? Have you thought about that? Does anybody want to comment on that?

Ms. CHATER. Well, I have certainly thought about it. I have visited many of our offices now, and I have taken it upon myself to interview the employees, sit beside them and look to see what they do and how they do it. Actually, I have watched a couple of disability claims being taken and watched the interaction between claimants and our employees.

I am very impressed with the expertise and the knowledge of our employees, and I really do not have a lot of questions in my mind about whether or not they can effectively perform a redesigned job. I think they can do a lot more than they are doing now. Part of our plan is to truly empower our employees to do all that they are capable of doing.

Chairman JACOBS. Speaking of doing more, I believe the proposal suggests that medical doctors do a little bit less, namely file a form

provided by the Social Security Administration saying *a*, *b*, or *c*. Can the person do this, can the person do that, and so on, without providing a lot of voluminous documents to back that up. It is an act of faith in the individual professional. That sounds to me like streamlining things and a lot of common sense. Do you see any pitfalls with it?

Ms. CHATER. No. As a matter of fact, I see it as an advantage, because we would be relying upon the medical doctor to give us a professional opinion, which would prevent us from second-guessing a professional medical opinion about a claimant's functional ability. I see it as a streamlining effort.

Chairman JACOBS. It strikes me that the only downside would be if a dishonest doctor tried to pull for a patient.

Ms. CHATER. Yes.

Chairman JACOBS. It was said in Lowenthal's "Credo of Democracy," that the whole system depends on the fundamental integrity of the individual. I do not think a private insurance company could stay in business 1 year, or that the IRS could collect the income taxes of this country, were it not for the God-given phenomenon that most people feel good about being honest and doing the right thing. So I do not find that to be any great pitfall.

There is a question, too, about the additional costs to the trust fund, if those who are now eligible and are not receiving benefits receive them because of more efficient administration of the benefits. Therein I think lies a question of whether something is half full or half empty.

Take for example, a person who goes and buys something in a store and charges it, and incurs the obligation, and when it comes time to pay that obligation, maybe he has sloughed it for 1 month and another month and another month and has not paid the bill, but then finally pays the bill. Is that increased spending, or is that just spending that was obligated already? I am not asking for your comment about it, but I would like to say for the record that it seems to me that they are two different animals.

If you decided to give a brandnew benefit to Social Security retirees such that everybody gets a new car in addition to their checks, that very definitely is increased spending. But if you only decide to pay what you already owe, I am not sure that it is forensically correct to characterize it as increased spending. Maybe I would like a comment from you about that? What do you say?

Ms. CHATER. I will pass. [Laughter.]

Chairman JACOBS. You pass with flying colors. We appreciate the testimony of you and your colleagues. Mr. Pickle appreciates it so much, he would like to have some more.

Mr. PICKLE. I would ask the panel, any one of you. One of the exciting proposals you made there is that at the appeals review level, the adjudicative officer can make a decision right there. Is that with or without the concurrence of the ALJ? Can you comment?

Ms. CHATER. The ALJs have been very much involved in the process of designing this proposal.

Mr. PICKLE. Are you saying that the ALJs approve of this step? Does the ALJ have to give their recommendation or concurrence on this approach?

Ms. DAVIS. The adjudicative officer would be empowered to make an allowance without ALJ concurrence.

Mr. PICKLE. Would be empowered to what?

Ms. DAVIS. To make an allowance, to allow the case, and he or she would do that on their own.

Mr. PICKLE. Thank you, Mr. Chairman.

Chairman JACOBS. Thank you, Mr. Pickle.

Thank you again, Dr. Chater, for your performance.

Ms. CHATER. If I might, Mr. Chairman, I just want you to know that I wish I could hear everything that happens today, particularly with the other panel members. I cannot stay, because I am going to do my administrative duties in Baltimore. But I want you to know that our team members are going to be here, because they are very much interested in what panel members have to say. I just wanted to share that with you.

Chairman JACOBS. We are aware, Dr. Chater, that you are more of a Commissioner than a witness, and we appreciate you pursuing your responsibilities.

I am going to ask the indulgence of the committee and pending witnesses, including the GAO, for me to call one witness out of order. When you are 4 years old, you are a pretty busy person and, like Dr. Chater, you cannot spend much time before congressional committees or subcommittees.

Ms. Mueller, would you give your testimony now, and your daughter can pursue her important activities, just as Dr. Chater has to. I assume that, one way or another, you will both be testifying. Would you care to introduce your advisor to the subcommittee? [Laughter.]

Ms. MUELLER. This is my advisor. She is Faith Mueller. She is my daughter. She is 4 years old. I could not arrange care. My husband cannot care for her at home. My 9-year-old, he can kind of fend for himself now. He had school, anyway.

Chairman JACOBS. You have the undivided attention of the committee, Ms. Mueller. Please proceed.

STATEMENT OF DIANE M. MUELLER, GREENSBORO, N.C.

Ms. MUELLER. I thank you first of all for the invitation to testify. I am basically here to advocate for a change in the Social Security disability system itself, basically to benefit other claimants that follow my husband. My husband is one who is disabled. Even though he is the one in our family who is disabled, it has affected the entire family, so I may say "we," even though I am not disabled.

In September 1991, my husband became ill. He never recovered. His name is Gary. He was hospitalized in November 1991, after several antibiotic treatments and just never got better. He was finally diagnosed with chronic fatigue syndrome, which is a diagnosis of exclusion. They do a lot of blood testing, as such, and try to find out if there is something else underlying it.

It left him weak, confused, very tired, with a constellation of other symptoms, including a lot of ghost pain, what I call "ghost pain," and unable to really work at all. We went ahead and followed doctor's orders. He rested and tried to recover and went to rehab. He never recovered, so we went ahead and applied for disability.

We filed in March 1992. We were issued benefits finally in January 1994. The dates are in my statement, which I would like to submit, so that I do not go into all these dates. It is just useless. But it went through two hearings and finally with the issuance of some benefits.

This procedure was fast, according to many knowledgeable sources who deal with Social Security and deal with the process itself. We did try to assist with letters and phone calls and tried to submit evidence or whatever they needed in order to speed things up through the entire time.

Our concerns addressed in the Social Security Administration proposal on disability process regarding processing time and treatment of the claimant/customer, especially those who fall through the system with diseases and disabilities where medical and clinical testing required in the criteria does not work, as in chronic fatigue syndrome.

The application interviewer at the start assured us that 80 percent of all cases were denied. Gary fell into that majority. When the case went before the judge, we encountered, in our opinion, arrogance and a condescending attitude, also expressed in a denial letter, which, if you need a copy, I do have a copy with me. By this point, we knew that criminals had better due process than claimants on disability, and we reluctantly hired an attorney to get through a process that we felt should not need an attorney to get through.

A lot of communication was done with different individuals in the administration to obtain information, and policy determination, particularly on how they determined Gary's disability. Somehow they went to Delmar Dowling. I do not have that person's title, but no clear answer was given. We had obtained the file from DDS, and we had to point out specific errors. No one was held accountable to correct those errors. Even when we felt that misconduct and prejudice was affecting the case, no investigation was ever initiated.

The unfortunate consequence to the family is devastating. Emotional turmoil created by losing a vital member of your family to a debilitating disease is stressful enough. Our lives, especially Gary's, had to be readjusted. We miss the Gary that we had and we live with the fact that we may never have him again, but we pray and we are trying to have confidence that he will recover one day and be the person that we had.

As Gary was the major breadwinner in our family, financial devastation ultimately led us to bankruptcy court. With just my income, there was a point that quitting my job and going on public assistance would have given me more spendable income. Yes, I did research it out and I did figure out what I would have coming in in food stamps and AFDC payments and Medicaid compared to medical expenses that we have been incurring.

It is even more frustrating to have a doctor say that you cannot work. Recovery did not look good, but then to have someone that does not know you, who does not even clarify discrepancies says that you can. All evidence in any record that goes to the Social Security Administration needs to be considered, whether it is subjective or objective. The greater weight of evidence needs to lie with

the claimant's own medical providers. Being in public service myself, it is hard to complete the task, if all information is not clarified.

Another example to prove fault with the current system and to advocate a change is as close as your phonebook, if you ask even your own staff or your own constituents about the lawyers and attorneys who are profiting off of just Social Security benefit reversals. I am all for free enterprise. I think it is great. But if a small city can support five or six attorneys and nonattorneys just doing Social Security disability cases, something is wrong somewhere, because eventually those cases got overturned.

I do not want to go over time here, but I have consulting material that was printed. I have different recommendations. I'll first go ahead and tell you to please talk to your own staff that work with the claimants. They can give you a lot of information. Congressman Coble's staff has really helped us, along with Congressman Coble.

I question the substantial gainful activity which is in that book, and a lot refers to that. I think that the Social Security Administration needs to be honest with the claimant. "Substantial" to most people would mean a lot more than \$500 a month. To make the decision, a lot is based on substantial gainful employment activity, also.

If there is some place I can move and live without assistance of \$500 a month, please let me know today, and then I can pack up.

If the Social Security Administration says to the claimant or DDS says to the claimant, yes, you are able to produce substantial gainful activity, my doctor says I cannot, but we say you can, then go ahead and prove it or issue benefits.

Basically, on the medical determinable impairment, consideration on exceptions must be given to the current provider and medical opinions of that provider. Some impairments like chronic fatigue syndrome cannot be clinically tested, but diagnosis is given through process of elimination.

The functional and medical impairment form for doctors was mentioned in that proposal, that seems to be a very good idea. I have a concern about the doctors having more paperwork to fill out besides all the paperwork for Medicare and Medicaid. At the same time, maybe there can be some kind of compensation, and I could see that speeding along the entire process.

Then if the common sense of the claims manager says that something is wrong with this individual, then active pursuit of information needs to take place by that person. If common sense says that this person is disabled by the greater weight of evidence that is submitted in the original record, then they need to look into the criteria. If they are not meeting specific criteria to pass a DDS inspection, then somebody has to examine that criteria. Perhaps some different criteria has to be initiated at that point in time or something has to be put in place for cases like my husband's.

For claimants who cannot read or who are functionally illiterate, they need help. They need an advocate, because trying to get through the forms and papers Social Security has can be very frustrating, and, also, vocational rehabilitation referrals to claims, if it is feasible.

In conclusion, I do agree that the system in place now is in great need of reengineering. The proposal set forth by the Social Security Administration looks good on paper. Be sure to look at all ramifications. This will cut down on the overall time, I can see that. But how many of the current cases that have been ultimately approved after all the appeals would have had to have gone through the entire process as it stands right now in the proposal.

Also the SGA and Social Security Administration definition of disability and functional ability needs to be looked at and thoroughly explained to the claimant. Will time, consideration and investigation cut down on the percentage of future appeal reversals?

Thank you very much for letting me come up here and speak and say something and share some of my frustrations.

[The prepared statement and attachment follow:]

Statement for Hearing; April 14, 1994

Ways and Means; Subcommittee on Social Security

Re: Disability Reengineering Proposal

By: Diane M. Mueller

Thank you for your invitation to testify. I am here to advocate a change in the Social Security disability process and determination for the benefit of claimants who follow so they don't go through what we went through. Although it is my husband, Gary, who is disabled, I say "we" because of the affect on the entire family emotionally and physically. This includes our children: Faith who is four and Greg who is nine.

Sept '91 Gary became ill with an infection or virus that hospitalized him in Nov '91 when antibiotic treatment did not help him. The illness sapped the energy, strength and clarity of mind and left my strong, energetic, active husband, weak, tired and confused along with a constellation of other symptoms. He never recovered and was diagnosed with Chronic Fatigue Syndrome(CFS). We trust and pray he will recover one day, however application for disability was filed in March '92, with issue of benefits in January '94. (3/2/92-filed for disability; 4/8/92-denial; 4/20/92-asked for reconsideration; 6/13/92-denial upheld; 6/21/92-requested hearing; 10/21/92-hearing; 11/20/92-denial by ALJ; 12/9/92-request Appeals Counsel; 6/16/93-case remanded back to same ALJ; 10/14/93-hearing; 11/5/93-favorable decision; 1/94-some benefits issued.) Please note, this was "fast" according to many knowledgeable sources. Throughout this process I tried to assist with letters and phone calls to speed things up.

Our major concerns, addressed in the SSA proposal are: the disability process regarding processing time and treatment of the claimant/customer; especially those who fall through the system with diseases and disabilities where medical and clinical

"testing" required in the criteria does not work, as in Chronic Fatigue Syndrome.

The application interviewer, at the start, assured us that 80% of all cases are denied. Gary fell into the majority in that case. When the case went before the Judge we encountered, in our opinion, arrogance and a condescending attitude..also expressed in the denial letter.(A copy can be provided) By this point we knew that criminals had better "due process" than claimants in disability, and reluctantly hired an attorney. Much communication was done to various individuals in the administration to obtain information and policy of determination. Somehow all letters went to Delmar Dowling and no clear answer was given. When specific errors were pointed out throughout the process, no one was held accountable to correct errors. Even when we felt misconduct and prejudice was affecting the case, no investigation was initiated.

The unfortunate consequence to the family is devastating. Emotional turmoil created by loosing a vital member of your family to a debilitating disease is stressful enough. Our lives, especially Gary's, had to be readjusted. We miss the Gary we had and live with the fact that things may never be the same again. As Gary was the major breadwinner, the financial devastation ultimately lead us to bankruptcy court. With just my income, there was a point that quitting my job and going on public assistance would have given us more "income" to live on monthly. We thank the Good Lord for family and friends that helped us or we would have been on the street. It is enough to struggle and adjust to a debilitating disability hitting your family, but then go through a demeaning process to obtain benefits you thought were protecting you. It's even more frustrating to have a doctor say you cannot work at all and recovery doesn't look good--but someone who does not know you nor clarifies evidence, decides you are not disabled. All evidence needs consideration, subjective and objective. The greater weight of evidence needs to lie with the medical providers of the claimant. Being in public service myself, it is hard to complete a task if all information is not clarified.

Another example to prove fault with the current system used by Social Security

is as close as your phone book. Look in any city's local advertisements and yellow pages at attorneys and non-attorneys who profit from and live off of disability claim reversals. Common sense says to me that something is wrong within the administration if a small city has 5 or 6 of these representatives making a living just from these claims. Makes sense to me that something went wrong during the process to not create an earlier favorable decision.

Consulting the material printed by SSA, my recommendations are as follows:

1. Talk to your personal staff here and at your home office. Those who are involved with the claimants.
2. Question the SGA (Substantial Gainful Activity-pg 37, 3/94) Either raise SGA or be honest with the claimant. "Substantial" to most people would certainly mean a lot more than \$500 a month. If there is somewhere I can move and live, without public assistance, for \$500 a month--please show me. Then if SSA say's to the claimant, you can produce SGA--prove it. Rehabilitate, train and facilitate the claimant to SGA level. If the claimant cannot, issue benefits in two months.
3. Medically Determinable Impairment(pg 38, 3/94) Consideration on exceptions must be given to the current provider and medical opinions of that provider(s). Some impairments, like CFS, cannot be clinically tested, but diagnosis is given through process of elimination. The functional/medical impairment form for doctors should be initiated at the start of implementation of this restructure with better than adequate monetary compensation. This should help defray cost and eliminate need for all medical papers.
4. If the common sense of the claims manager say's that something is wrong with the development of the case, an active pursuit of information needs to be initiated. If common sense says the claimant is disabled by the greater weight of the evidence, but does not meet specific "criteria"; a provision needs to be in effect to correct terminology needed to develop ongoing listings and criteria.
5. For claimants who cannot read, an advocate must be found by SSA for the

claimant. This is so that claimant can understand each step and expectation. This advocate can not be paid from the claimants benefits.

6. Offer vocational rehabilitation referrals to the claimant if it is feasible.

In conclusion, I agree that the system in place now is in great need of ratification. The proposal set forth by SSA looks good on paper. Be sure to examine All ramifications. This will cut down on time, but how many of the current cases that have been ultimately approved after appeals would still be denied and required to go through appeals in the new process because of criteria, SGA and SSA definition of disability and functional ability? Will time, consideration and investigation cut down the percentage of future appeal reversals?

Thank you again...Please feel free to comment or question anything I have said today. If more information is needed, I will provide as soon as possible.

Respectfully
Submitted

Diane M. Muller

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF

Gary Mueller
(Claimant)

(Wage Earner)

CLAIM FOR

Period of Disability,
Disability Insurance Benefits, and
Supplemental Security Income

122-52-2131

(Social Security Number)

PROCEDURAL HISTORY

The claimant filed an application for Title XVI supplemental security income payments on February 26, 1992. He alleged that his disability began November 20, 1991 due to chronic fatigue syndrome and post-infectious encephalitis. On March 5, 1992, the claimant filed an application for Title II disability insurance benefits alleging disability since September 15, 1991. Claimant's applications were denied at the initial and reconsideration determination levels and he filed a timely Request for Hearing by an Administrative Law Judge. Pursuant to that request, a hearing was held before the undersigned on October 21, 1992, in Greensboro, North Carolina. The claimant was present and testified. He was represented by Reverend Kermit Bailey. The claimant's wife, Diane Mueller, was present and testified as a witness for the claimant. At the request of the undersigned, Dr. Edwin L. Bryan, a medical doctor, and Dr. Thomas K. White, a specialist vocational counselling and rehabilitation, were present to serve impartially as medical expert and vocational expert, respectively. Dr. Bryan testified; Dr. White was not called.

Following claimant's testimony concerning his work activity which established that he worked to November 1991, the claimant and his representative amended claimant's alleged onset date to November/nf/1991.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

DECISION: It is the decision of the Administrative Law Judge that the claimant has not been disabled for the required durational period of 12 continuous months during the time period under consideration for this hearing decision but retains the residual functional capacity to perform past relevant work. Disability, therefore, cannot be established under Regulations 404.1520(e) and 416.920(e).

RATIONALE

Biographical data establishes that the claimant was born March 13, 1961 and is currently 31 years of age. The Regulations define this as a younger individual. The claimant completed high school and took additional training to become a commercial tractor trailer driver. Claimant's past work includes that of a tractor trailer driver, supervisor/manager of a car rental agency, stock room manager, and car washer for an automobile dealership. A review of the claimant's earnings record indicates that he met the special insured status requirements of the Act on his amended alleged onset date and remains insured beyond the date of this decision. The claimant alleges that he has not engaged in substantial gainful activity on a sustained basis since November 1991, and the undersigned finds no evidence to the contrary. Accordingly, the time period under consideration for

this hearing decision extends from claimant's amended alleged onset date of November 1991 to the present.

The medical evidence of record establishes symptoms consistent with psychological disorders with chronic fatigue. The Administrative Law Judge is persuaded that the claimant's impairments impose more than minimal limitations and restrictions on his ability to perform work-related activities and, therefore, rise to the level of a "severe impairment" within the meaning of the Social Security Act and Regulations 404.1520(c) and 416.920(c). The record, however, does not show an impairment which meets or equals the severity of any impairment listed in Appendix 1 to Subpart P of Part 404 of Regulations No. 4. The claimant's psychological impairment does not approach the level contemplated in section 12.00 of the Secretary's Listing of Impairments, and chronic fatigue is not a listed impairment. No physician designated by the Secretary as competent to express an opinion on the issue has stated that claimant's impairments, singularly or in combination, meet or equal a listing in Appendix 1. Disability, therefore, cannot be established under Regulations 404.1520(d) and 416.920(d).

In evaluating claimant's disability, the undersigned has considered the possible combined effect of all the medically determinable impairments, both severe and non-severe, which have each met the duration requirement of the Act, and found no additional or greater degree of limitation as a result thereof. Furthermore, as required by Fourth Circuit case law and Social Security Ruling 90-1p, the Administrative Law Judge has evaluated claimant's subjective symptomatology and alleged functional limitations in addition to evaluating the objective documentary evidence.

Regulations 404.1520(e) and 416.920(e) provide that when the Administrative Law Judge cannot make a decision of disability based on the claimant's current work activity or on medical facts alone, and the claimant has a "severe impairment(s)", then the Administrative Law Judge must review the claimant's residual functional capacity and the physical and mental demands of the work he performed in the past to determine whether, in spite of a severe impairment(s), the claimant retains the residual functional capacity to perform his past relevant work.

Having independently evaluated all of the medical evidence of record and considered the testimony of the claimant and his wife

as presented at the hearing, the undersigned concludes that, for the reasons hereinafter discussed in detail, the claimant retained, at all times pertinent to this decision, the residual functional capacity to perform his past work as a car washer for an automobile dealership. In arriving at the claimant's retained residual functional capacity, the Administrative Law Judge considered both the objective documentary evidence and claimant's alleged subjective symptomatology and functional limitations.

The objective evidence indicates that claimant's problems started with flu and cold symptoms in September 1991 and he was treated for a sinus infection. In October he developed a low grade fever. In late November he was hospitalized with a diagnosis of mycoplasma pneumonia. He reported problems with his memory and confusion and complained of easy fatigability. The claimant alleged symptoms of pain in his lower back and lower extremities below the knees. He reported problems with tremors in his hands which he described as sometimes visible but other times "internally." After examining the claimant, his treating physician noted that claimant's neurological exam was normal; his motor testing and strength was within normal limits; claimant had minimal tremor of the outstretched hands. The physician stated that she could not formulate a specific diagnosis; she reported that the claimant presented a puzzling constellation of symptoms with an essentially normal neurological and general examination.

Other documentary evidence indicates that claimant has had a normal CPK; LP and NCV testing was normal; thyroid function studies were entirely normal; claimant had a normal MRI of the brain; EEG normal; and claimant demonstrated negative on HIV testing.

The claimant has been examined by his primary and numerous consultative physicians including Dr. David Massey, Dr. Donna Gaitz, Dr. Jeffrey L. Schmidt, Dr. Lane, Dr. Joel E. Vogt, Dr. J. Gary Hoover, Dr. John F. Campbell, and psychologist Dr. Robert Milan.

Dr. John F. Campbell, a specialist in infectious disease, reported that he did not believe anyone would come up with an exact diagnosis of claimant's problems, but that his current symptoms fit quite nicely into chronic fatigue syndrome. Dr. Campbell described claimant's symptoms as an unusual constellation of problems and stated that he was reassured by the

extensive testing done which showed normal findings. He said he was also encouraged by the fact that claimant was not losing weight. Dr. Campbell did not believe claimant was clinically depressed at the time. Dr. Campbell told claimant he did not perceive any of his physicians coming up with a diagnosis or a simple therapeutic cure and recommended claimant proceed with rehabilitation beginning with physical rehabilitation. The physician recommended several nonspecific programs to him and encouraged claimant to resume physical activity and attempt to lose some weight (Exhibit 27, pp. 20-22).

When claimant was examined by Dr. Schmidt on January 21, 1992, the claimant reported inability to sustain any physical or mental activity, Dr. Schmidt stated he could detect no gross problem with his memory. On testing the claimant's strength, the physician noted that the claimant had some element of give-way weakness. Dr. Schmidt again stated that there was no neurological diagnosis for the claimant's problems (Exhibit 23, p.3). Because there was no significant organic findings from claimant's multiple explorations of a physical cause for his problems, claimant was referred to the Guilford Psychiatric Association and was first seen by Dr. Joel E. Vogt on January 10, 1992. Dr. Vogt prescribed Prozac for seven days, but when there was no change in claimant's symptoms this was not continued. His essential findings were that of an atypical depression. Dr. J. Gary Hoover, a practicing psychologist, reported that behaviorally the claimant presented as an anxious man who was increasingly frustrated by the lack of direct physical findings and consequently, medical treatment that is effective. He administered various tests to the claimant and found that claimant's WAIS-R Test results showed a verbal I.Q. of 100, a performance I.Q. of 94 and a full-scale I.Q. of 97, which Dr. Hoover interpreted as essentially within the average range. The psychologist reported that the claimant's general cognitive skills are well within the average range. He reported the Bender-Gestalt Test was completely within normal limits. In evaluating the claimant's personality functioning, Dr. Hoover reported that on the MCMI Test, claimant presented a protocol quite consistent with somatization disorder with prominent hypochondriacal features and anxiety disorder. Dr. Hoover concluded that cognitive testing suggested no observable neuropsychological deficits, but that personality-wise he appeared to be a dependent, somewhat narcissistic man who, under increasing stress, will show symptoms of a conversion disorder.

Dr. Hoover remarked that claimant was probably depressed at the time of the evaluation and might well continue his course of antidepressant medication with some relief, but that psychotherapy would be beneficial in the long run for him to become more adaptable and independent (Exhibit 25, p. 6).

In an effort to determine if claimant's symptoms could be related to depression, he was referred for a psychological evaluated. However, as Dr. Gary R. Greer pointed out, the claimant's psychological evaluation performed February 3, 1992 mentioned that claimant seemed to be dependent and somewhat narcissistic person who will show conversion symptoms and who is probably depressed, but that there was no actual diagnosis given (Exhibit 20, p. 30).

In order to determine if claimant had physical and/or psychological impairments that would impose significant functional limitations and preclude him from performing past relevant work, the undersigned asked Dr. Edwin L. Bryan, the medical expert, if claimant had an impairment established by clinical findings and laboratory test results that would meet the medical criteria contemplated in the Secretary's Listing of Impairments or impose significant functional limitations. Dr. Bryan testified that the claimant does not have a diagnosis that can be named by acceptable clinical and laboratory techniques. Dr. Bryan testified that claimant reports symptoms of fatigue, unusual aches and pains, and poor concentration that has been categorized as chronic fatigue, but that there is no acceptable laboratory or clinical evidence that would allow any specificity as to that diagnosis. Dr. Bryan stated that claimant does not have an impairment, or combination of impairments, that meets or equals a listing in the Secretary's Listing of Impairments. He stated that the extensive psychological evaluation did not produce an exact etiology of the problem. He indicated that it would be a question of the affect of claimant's symptomatology on his ability to function.

After independently evaluating all of the documentary evidence and considering the testimony presented at the hearing by the claimant, his wife and the medical expert, the Administrative Law Judge concludes and so finds that the best objective evidence of record establishes that the claimant does not have any significant muscle weakness, musculoskeletal limitations, or neurological deficits. His general physical examination have

almost consistently been normal. Furthermore, as indicated on the Appended Psychiatric Review Technique Form, the undersigned concludes that claimant's psychological impairments do not impose functional limitations that would preclude sustained work activity.

As stated above, the Administrative Law Judge has also evaluated claimant's subjective symptomatology and alleged functional limitations. At the hearing claimant testified that he cannot work because he does not have the ability to concentrate and gets distracted easily. Throughout the hearing he complained of problems with memory and concentration. He alleged that anything slightly strenuous, such as the hearing, would put him in bed for several days. The record indicates that after being "let go" from his last job as a tractor trailer driver due to what he described as a misunderstanding between the dispatcher and him, the claimant elected to become a "house mom". In the beginning claimant took care of his youngest child, did household chores and engaged in various part-time work. Claimant alleges that due to an exacerbation of his symptoms, he is no longer able to take care of the child and must now send her to day-care and no longer has a part-time job. He testifies that he is still able to do some household chores such as laundry and dishes, but that he often loses concentration and is forced to take a nap between noon and 3:00 p.m. He testified that he watches TV for eight hours because it requires the least amount of effort. He relates that he reads one-half hour in two 15 minute segments. Claimant indicated that he drives 20-30 miles a week to his psychologist's office or on some errand. He testified that he does not do any cooking because the task is too demanding. Claimant testified to very limited daily activities, however, it must be noted that his testimony is not fully consistent with the record generally and a factor of "secondary gain" may be at work. That is, one who seeks monthly disability benefits can be expected to recognize that the capability for daily housekeeping activities at home may suggest a capacity for similar types of exertion in a work setting. Considering his demeanor and manner of testifying, the undersigned concludes that he is deliberately exaggerating any discomfort he may have. The claimant arrived in a wheelchair which he reported his mother had brought to him on her visit the previous month. The undersigned noted that he stood up several times during the hearing and got up out of the wheelchair without much effort and moved around freely. Although claimant testified to little appetite, he was healthy, robust-looking with good

color and a bright affect. Claimant did not appear tired or fatigued in the least. Likewise, his allegation of memory difficulties is equally lacking in credibility. He answered all questions without difficulty. His memory and concentration seemed perfect.

The claimant testified that he could lift a gallon of milk. He did not allege any significant physical functional limitations. His testimony rather consistently related impairments common to "chronic fatigue syndrome" rather than specifically to him. His testimony often started with words to the effect that people with this disease have such and such. The claimant's wife attempted to paint an even more bleak picture suggesting that she had to bathe the claimant because he was unable to take care of his personal needs due to weakness. Claimant's medical examination have indicated that claimant has no neurological deficits and that his motor testing and strength are within normal limits.

According to claimant's medication list, he uses a fair amount of prescribed pain medications. We believe it fair to assume that his doctor would not prescribe it, and he would not spend money for it unless it was having a substantial relieving effect. Although claimant came to the hearing in a wheelchair. There is nothing in the documentary evidence to suggest that this was prescribed by a physician. On the contrary, his physician has specifically recommended that claimant begin a physical rehabilitation program and suggested walking as one program.

The Administrative Law Judge is not unaware of the letters in the documentary record signed by Dr. John F. Campbell, infectious disease specialist, and by claimant's therapist, Robert Milan, suggesting that claimant is unable to work. The Administrative Law Judge is aware that most physicians and therapists attempt to support their patient's wishes in their efforts to secure disability benefits and will often write a supportive letter on their behalf. When the opinion is supported by clinical findings and laboratory test results or other persuasive evidence, they are entitled to great weight, however, the Administrative Law Judge must consider the extent to which the opinion is supported by specific and complete clinical findings and its consistency with the other evidence. In this case, the suggestion that claimant is unable to work is inconsistent with earlier evaluations of this same medical personnel. Dr. Campbell has directed claimant to increase his physical activities. Having

studied all of the subjective evidence, the undersigned is persuaded that the claimant's impairments would not preclude work activity at the medium exertional level which would not be highly stressful. According to claimant's description of his work as a car washer for an automobile dealership, his duties were not stressful nor did they require exertional activity of as much as the medium level. Accordingly, the Administrative Law Judge concludes and so finds that claimant retains the residual functional capacity to perform his past relevant work as a car washer for an automobile dealership and, therefore, is not disabled within the meaning of the Social Security Act and Regulations 404.1520(e) and 416.920(e).

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act in November 1991, the date the claimant stated he became unable to work and continues to meet them through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since his amended alleged onset date of November 1991.
3. The medical evidence establishes that the claimant has symptoms of fatigue and a psychological impairment, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.
4. Claimant's allegations of pain and other subjective symptomatology and his allegations of functional limitations are neither consistent with the record nor, for the reason set out in the rationale, found credible.
5. The claimant has the residual functional capacity to perform work-related activities except for work involving highly stressful activity or exertion above the medium level (20 CFR 404.1545 and 416.945).

6. The claimant's past relevant work as a car washer for an automobile dealership did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1565 and 416.965).
7. The claimant's impairments do not prevent the claimant from performing his past relevant work.
8. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 404.1520(e) and 416.920(e)).

DECISION

It is the decision of the Administrative Law Judge that, based upon the applications filed on March 5, 1992 and February 26, 1992, the claimant is not entitled to a period of disability or disability insurance benefits under sections 215(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

Paul T. Williams
Paul T. Williams
Administrative Law Judge

NOV 19 1992.

Date

AWC/jl

Chairman JACOBS. We thank you, Ms. Mueller.

Mr. Bunning.

Mr. BUNNING. I have no questions, Mr. Chairman.

Chairman JACOBS. I do not think we have any questions. I think your statement was very helpful and very complete, so you can gather up your belongings and head back to North Carolina.

Ms. MUELLER. I appreciate it. Thank you.

Chairman JACOBS. Thank you very much.

We will have to go over and cast a vote in a moment, but maybe we can get started with the GAO, with Mr. Reilly and Mr. Baptiste. We thank you for your indulgence.

STATEMENT OF FRANK W. REILLY, DIRECTOR, INFORMATION RESOURCES MANAGEMENT/HEALTH, EDUCATION, AND HUMAN SERVICES, ACCOUNTING AND INFORMATION MANAGEMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY LEONARD BAPTISTE, JR., ASSISTANT DIRECTOR; AND BARRY TICE, ASSISTANT DIRECTOR

Mr. REILLY. Thank you.

As a matter of fact, it is the kind of problem that Ms. Mueller identified that has really been driving this process.

Mr. Chairman and members of the subcommittee, I am very pleased to be here today to discuss a recent proposal to restructure the disability insurance determination process at the Social Security Administration. Our work for the subcommittee is focusing on SSA's efforts to reengineer and automate its disability determination process.

The gentleman to my right, Mr. Baptiste, has led the team that has been looking at this process now for about the last 1½ years. The gentleman on my left, Mr. Tice, is sort of our guru, if you will, on disability insurance policy at SSA. So between the two of them, I think we have a pretty good understanding of what is going on.

Chairman JACOBS. And between the two of them we have you.
[Laughter.]

Mr. REILLY. You have our written statement, and what I will do is just go through it and highlight some of the points that Ms. Chater and Rhoda Davis and Mr. Croft have already made, and start off by saying that we very much support the reengineering process. I cannot say anything more unequivocally than we just think that this is something that had to be done for the very reasons that Ms. Mueller said.

If you put yourself in the position of being disabled and you have to wait a minimum of 155 days just to get somebody to tell you yes or no, and then have to wait 2 and 3 years, there is something really wrong with that system. So we do have a crisis, as I think all of you up there have said this morning.

The current process is extremely stressed. The workloads are increasing, and that is one of the things that we have got to constantly keep in mind, that this thing really turned around dramatically to the bad in the late 1980s. That is when the quantity of new disability cases started to increase dramatically.

SSA tried to solve this first with some automation attempts at the various State DDSs. However, these attempts have only had marginal impact, because they focused on automating existing inef-

ficient processes, for the reasons that we have heard this morning. As Mr. Houghton was saying, until recently, SSA was not seeking the major business process improvements necessary to reverse the seemingly intractable problem of long waiting times and mounting case backlogs at State disability determination offices.

Now, the disability process redesign paper that was given this morning that was released on April 1 is really a valid attempt to address major fundamental changes needed to realistically cope with this problem. I think the combination of top management leadership—and we have only positive things to say about Commissioner Chater and her staff—with the necessary staff and resources, and certainly what you have seen in this proposal is the product of some real skilled people to do what they did in the period of time that they did it.

So that is why it is credible. They have documented the existing disability determination problems, and they have recommended a solution to dramatically change the process. However, like any major reform effort, implementation issues need to be addressed, and I think this is what we want to mostly concentrate on. These include new staffing and training demands, developing necessary automation requirements, and confronting the entrenched cultural barriers to change—and do not ever underestimate that.

I spent most of my life designing information systems and installing them, and I can tell you that you can put in a system guaranteeing everybody \$1 million, and there are going to be people who oppose it, simply because it is something new. So we have to accept that as a part of the problem.

I am not even going to review what the current disability determination process is, because it has been more than adequately covered by Ms. Chater's comments and by all the charts that she showed, and I think those charts are very dramatic evidence of what the problem is. And I cannot imagine anything I could possibly say that would add to that.

I can say something about the planning for automation. We are very concerned, as your committee and the Appropriations Committee both have been asking us to look at this now for some time. We recognize that SSA has started this reengineering process. First, in May 1990, SSA required the State offices to meet six baseline automation requirements, which is like first grade kinds of things. You know, if you want to put it in school, you can acquire some basic capability to handle the problem.

Then in August 1992, they began to develop a single disability software system, which is called the modernized disability system, which really would be the front end, if you will, of this disability process that we are talking about. It would take the data from the claimants, it could take it from their doctor, for example, in electronic form. As the data comes in, they would put it into this computerized record, all the claims data, and that would enable them to manage the case, which is a huge problem today.

I could just say as an aside that we have looked at where the current records are stored in the field, and if you went out and tried to find those records for yourself, Mr. Jacobs, you would lose your mind, because there are tens of thousands and millions of records in locations that hundreds of people just have to go and

look for physically. So what they are talking about here would at the front end of this process to start collecting all this data in electronic form, which I think is critical to this system.

They have talked about SSA's intelligent work station and local area network initiative, which we have had lots of discussion with them on. Their current plans are to acquire about 60,000 personal computers—that is 6 with 4 zeroes.

Chairman JACOBS. Mr. Reilly, we are going to have to suspend just a few minutes for the vote. Before I go, I am sorry that Mr. Pickle has left. There is an old song that says, "It Seems Like Old Times," and I would like to say for the record that Pete Singleton and Bill Kelly and Fred Arner are here. They were the brains of this outfit a decade ago, and we are very pleased that you are here with us today, and we will continue just as soon as I can cast a vote.

The subcommittee stands in recess.

[Recess.]

Chairman JACOBS. The subcommittee will be in order.

Mr. Reilly, please proceed.

Mr. REILLY. Thank you, Mr. Chairman.

Before you broke for the vote, I was talking about the plans that Social Security has for what they call the IWS/LAN, which is intelligent work stations and local area nets. Now, this is a whole new technology which is coming out to replace so-called mainframe computers. SSA has large central processors, and now they have about 30,000 what they call dumb terminals at the end of the system all over the country.

Well, SSA's intent here is to have, to start with, about 60,000 personal computers, 2,400 local area nets, which is a lot. Over the last 2 years, this number has varied. They started off with 95,000 personal computers originally, and now they are down to around 60,000.

The basic problem we have, and why we support everything that you have heard here this morning, is that since they have not completed their business planning, they cannot at this time adequately describe to us how they are going to use the personal computers and really how many they are going to need.

Our concern is for this reason: You can buy a personal computer for the approximate cost of \$1,500. But studies that have a lot of relevance show that, over a 5-year period, the entire cost of a personal computer runs about \$40,000, and that includes desks, as you need ergonomic desks, because you do not want people to get carpal tunnel syndrome, because it is a real problem today, you have got to have support, all kinds of technical support to keep these things going. We have them at our own agency, and it requires constant attention. So this is why this number jumps from a \$1,500 purchase price to a long-term cost over a 5-year period of over \$40,000.

So we have that in our mind when we look at numbers, and we know that if you tell us that you are only going to spend \$1 million now or \$1 billion now, that is going to be multiplied by many dollars. So, for this reason, this cost-benefit analysis becomes a very major issue with us, because we are looking down the road and we want to make sure that, as we handle this new workload and we do all these good things, that we can do it in a way we can afford

it, because long-term we know that this subcommittee and appropriations subcommittees are going to be asking us these kinds of questions.

So to summarize our support of reengineering and our automation standpoint, we need a firm handle on how this is going to be implemented and what the long-term costs are going to be.

Chairman JACOBS. That is a key issue, Mr. Reilly, or the most vexing of all of them.

Mr. REILLY. Between now and July 1, which is the 90-day period, we would expect that these various questions that are being raised will hopefully be answered. That is, we know some of the questions that some of the people will be asking this morning about the effects of streamlining and the quality of the decisions. We recognize the importance of that, and we generally believe that information systems supporting this will certainly help the quality.

During the break, I talked with Ms. Mueller, and one of the problems she pointed out is, without a computer system, the records get misplaced, get lost, and they have to come in with a whole new set of records. So SSA's plans would take care of much of that kind of a problem. So in giving service to the public, and at the same time being a more efficient process, I think it is bound to be better.

To do all of this, though, as many people have raised the question this morning, you are going to need a human resource plan to guide all these personnel actions, decisions, training, what have you, and we expect that would be a part of what we are going to see in the implementation.

Finally, we would hope in the implementation process that, as a part of laying out the information system to support these new systems, the reengineered systems, the discussions with the States, the employees and the public will all deal with what each is expecting out of this new process.

We know there are all kinds of questions that people have—we just attended the DDS meeting in Boston last week, where State directors were in, and since we have been working with them for a couple of years, they feel very free to talk to us, and basically we saw a lot of positive support, but they raise questions on implementation which we cannot answer at this time, nor can anybody.

I would like to say in conclusion that we are pleased that SSA is working to reengineer the disability determination process. This innovative management effort will provide SSA with some of the guidance it needs to define its automation needs and improve service to the public. While this is a good first step, this subcommittee and SSA should not underestimate the challenges facing SSA to successfully implement the major process changes that are needed. Such changes, however, offer the only realistic hope of achieving meaningful improvements in service delivery.

Consequently, the General Accounting Office plans to address more fully the details of SSA's proposal during the comment period and monitor the agency's progress in pursuing its plans.

The bottomline question for us is what is it going to take to do the implementation, how much is its cost, what is going to be its benefit, and what time period is this going to be taking. Commissioner Chater pointed out that by this fall they will be doing certain things. But we would like to see between now and 1997, if that is the magic date, exactly how this thing is going to be implemented. What is the old saying? It is the devil in the details, and that is what we want to make sure are addressed properly.

[The prepared statement follows:]

STATEMENT OF FRANK W. REILLY
DIRECTOR, INFORMATION RESOURCES MANAGEMENT
HEALTH, EDUCATION, AND HUMAN SERVICES
ACCOUNTING AND INFORMATION MANAGEMENT DIVISION
U.S. GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss a recent proposal to restructure the disability insurance determination process at the Social Security Administration (SSA). Our work for the Subcommittee is focusing on SSA's efforts to reengineer and automate its disability determination process.

SSA's current disability determination process is extremely stressed. Workloads are increasing, and the backlogs are enormous. SSA has financed various automation efforts in an attempt to improve operations. However, these attempts have only had marginal impact because they focused on automating existing inefficient processes. Until recently, SSA was not seeking the major business process improvements necessary to reverse the seemingly intractable problem of long waiting times and mounting case backlogs at state disability determination service (DDS) offices.

The disability process redesign proposal, introduced on April 1, 1994, is the first valid attempt to address major fundamental changes needed to realistically cope with disability determination workloads. Combining top management leadership with the necessary staff and resources resulted in a credible proposal that documents the existing disability determination problems and recommends a solution to dramatically change the process. However, like any major reform effort, many difficult implementation issues will need to be addressed. These include new staffing and training demands, developing necessary automation requirements, and confronting the entrenched cultural barriers to change.

Today I will focus my remarks on why radical changes in business processes are imperative and highlight some of the key implementation issues that SSA must successfully address as it moves forward with this proposal.

SSA's DISABILITY DETERMINATION PROCESS

The current disability determination process at SSA and state DDS offices can be characterized by massive workloads involving an undefined number of activities. SSA projects that disability beneficiaries will more than double, from 4.2 million in 1990 to 8.7 million in 2005. The workload for initial disability claims has risen from 1.7 million cases in 1990 to an estimated 2.9 million cases in 1994, and SSA estimates that case backlogs could reach a million cases by 1995. SSA's reported administrative cost for processing initial disability and appeals determinations was about \$2.5 billion in fiscal year 1993--over half of its reported total administrative costs.

The disability determination process has evolved over the last 40 years, with each state defining its own DDS operations. In 1993, SSA reported that disability claimants waited an average of 155 days to receive an initial disability decision. However, only 13 hours in actual task time is spent on this determination. The remaining time is spent moving paper claims files among 16 to 26 staff workers, waiting in queues to be handled by staff, and obtaining medical evidence from outside sources. If applicants challenge the denial, they face even longer waiting times. SSA estimates that an average claimant involved in the appeals process will wait roughly 8 months before a reconsideration decision is made, over a year-and-a-half before a hearing decision is made, and 2 years before an Appeals Council decision is made.

AUTOMATION EFFORTS TO IMPROVE SSA'S
DISABILITY DETERMINATION PROCESS

In its agency strategic plan, SSA said its first priority is to improve the disability determination process. SSA has initiated several ongoing automation efforts to improve this process. In May 1990, SSA started requiring state DDS offices to meet six baseline automation functions. In August 1992, SSA began to develop a single disability software system--the Modernized Disability System.

SSA also has plans to implement its intelligent workstation and local area network (IWS/LAN) initiative. Current plans are to acquire about 60,000 personal computers and 2,400 local area networks to support agencywide operations. Over the last 2 years, SSA has changed the number of computers it plans to acquire, from 95,000, to 80,000, to its current estimate of 60,000. However, because SSA has not completed business planning, it cannot adequately determine how many personal computers will be required.

The number of personal computers needed is important because the purchase cost of the equipment is merely one factor to be considered--installation and other support costs are much larger expenditures. A 1993 private sector study estimated that when all of the support costs over a 5-year period are considered, businesses spend an estimated \$40,000 for each personal computer--a cost of \$400 million for every 10,000 personal computers.

Our primary concern with all of these automation efforts is that they are not linked with business planning and reengineering efforts. The efforts should identify how, where, and when SSA is planning to use automation to implement improvements--including measurable short- and long-term costs and benefits that can be assessed and revised annually. This essential guidance is needed to identify how new systems should be designed and implemented to adequately process increasing disability workloads and improve service to the public. Without focusing on how processes can be changed, SSA risks using limited resources to automate offices without any assurance that operations and service to the public will improve.

SSA TAKES STEPS TO DEVELOP
A PLAN AND REENGINEER DDS
PROCESSES

In response to our concerns, SSA has initiated efforts to develop business and operations service delivery plans and to reengineer its disability determination process. While the business and operations service delivery plans are not yet complete, SSA's disability process reengineering team issued a proposal on April 1, 1994, to redesign SSA's disability process. SSA established a 60-day comment period for this proposal. Although a final decision will not be made until the comment period has ended, the actions by SSA management taken to initiate and develop the proposal are essential steps toward reducing the disability claims workload. The team took the steps needed to document SSA's existing disability determination process and present management with a credible solution.

The solution focuses on streamlining the determination process and improving service to the public. The proposed process is intended to reduce the number of days for a claimant's first contact with SSA to an initial decision, from an average of 155 days to less than 40 days. To accomplish this goal, the team proposed that SSA establish a disability claims manager as the focal point for a claimant's contact and that the number of steps needed to produce decisions be substantially reduced. The proposal also suggested providing applicants with a better

understanding of how the disability determination process is working and the current status of their claims.

While this is an excellent first step, more work will be needed before a solution is chosen, tested, transitioned to, and implemented. Like any major change, there will be many issues that SSA will need to address.

For instance, the ability to ensure that quality decisions are made within appropriate time frames will depend on having a well-trained, competent, and highly motivated work force that has the necessary tools and technical support. As we noted in October 1993,¹ SSA needs a human resource plan to guide personnel decisions. Without such a plan, SSA risks being unprepared for anticipated workload and workforce changes and jeopardizes its ability to adequately serve the public.

A comprehensive quality assurance program will also be needed to define and implement quality assurance standards. Such a program should ensure the integrity of the administrative process and promote nationwide uniformity in making disability determinations.

As SSA decides how the disability determination process can be changed and redesigned, information systems will be needed to support the new processes. SSA will need to evaluate and refocus its current automation initiatives to ensure that it has systems that adequately support the reengineered disability determination process.

The concerns of states, employees, and the public will also need to be addressed. States, as the administrators of the disability process, need to be involved in implementing any changes. Cultural issues affecting employees who operate the program, such as skepticism and natural resistance to change, need to be overcome as roles and responsibilities change. The public, as the customer, will need to be satisfied with any changes that are made.

Finally, costs and benefits will need to be assessed to ensure that any proposal meets short- and long-term objectives and is cost effective. Such assessments should establish measurable cost and performance goals that can be assessed annually.

In conclusion, we are pleased that SSA is working to reengineer its disability determination process. This innovative management effort will provide SSA with some of the guidance it needs to define its automation needs and improve service to the public. While a good first step has been taken, this Subcommittee and SSA should not underestimate the challenges facing SSA to successfully implement the major process changes that are needed. Such major process changes, however, offer the only realistic hope to achieving meaningful improvements in service delivery. Consequently, we plan to address more fully the details of SSA's proposal during the comment period and monitor the agency's progress in pursuing its plans.

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Mr. Chairman, this concludes my testimony. I would be pleased to address any questions you or other Members of the Subcommittee may have.

¹Social Security: Sustained Effort Needed to Improve Management and Prepare for the Future (GAO/HRD-94-22, Oct. 27, 1993).

Chairman JACOBS. Mr. Reilly, the committee thanks you for your testimony. It has been very useful, and it is particularly important, I think, to hear the accolades from GAO. It is gratifying that your organization, through the scientific approach, has reached the same tentative conclusion that I have from reading the newspapers and the releases from SSA. It looks good.

Thank you very kindly.

Mr. REILLY. Thank you, sir.

Chairman JACOBS. The first panel, minus one, consists of the Consortium for Citizens With Disabilities, Martha E. Ford, cochair; Matthew Diller, associate professor of law, Fordham University School of Law; and the Association of Administrative Law Judges, Hon. David P. Tennant.

Ms. Ford, you are first. We have about 5 minutes and that is about what you get.

STATEMENT OF MARTHA E. FORD, COCHAIRPERSON, SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES, AND ASSISTANT DIRECTOR, GOVERNMENTAL AFFAIRS, THE ARC

Ms. FORD. Thank you.

Mr. Chairman, my testimony represents the initial reactions of the Consortium for Citizens with Disabilities' Task Force on Social Security to the reengineering team's proposals. We expect to complete a more thorough analysis and will submit our complete comments to this subcommittee.

Regarding the proposed procedures for entry and intake into the system, we believe that the system has indeed moved toward a substantial restructuring and improvement. The proposed streamlining of the number of agency employees who handle a claim and the empowering of frontline disability claims managers to work with claimants, gather evidence and make initial decisions and the use of receipts could result in more efficient and improved service. We urge SSA to continue to move forward in its efforts to streamline the claims process itself.

However, the team's report includes recommendations for several changes which have the potential for devastating the notion of disability as it has evolved over time. I will address three major concerns.

First is the proposal to replace the listings of impairments with an index of disabling impairments and remove any functional criteria from the index. We view the inclusion of functional criteria within the mental impairment listings as a major improvement in the system for determining disability. SSA officials were even publicly discussing their intention to further address functional issues in the scheduled revisions of each of the listings, where appropriate. The team's proposal to eliminate functional aspects of the listed disabilities would be a step backward.

Second, the proposal to incorporate the Americans with Disabilities Act criteria of reasonable accommodation into the new index of impairments and into the proposed new baseline of occupational demands: It appears that the team lacks a fundamental understanding of the potential interaction between the requirements of the ADA and the requirements of the Social Security disability pro-

grams and the resulting potential negative impact on people with disabilities.

Under a literal interpretation of the proposed standard for the index, and given the wide variety of reasonable accommodations that might be required by the ADA, it would be difficult to describe a disability which could be included in this index.

In addition, the injection of the ADA reasonable accommodations standards into the fourth step of the evaluation of disability may create further problems. Essentially, the ADA is a civil rights law. The Social Security Administration is not charged with enforcement over employers under the ADA. Therefore, to establish a standard which assumes reasonable accommodations for the purpose of establishing eligibility for the Social Security disability programs may potentially establish barriers for the individual by, in effect, shifting the employer's burden of compliance with ADA onto the claimant or potential employee.

Third, the apparent intention to revisit, so soon after promulgation, the extensive work of the agency in developing the childhood functional impairment criteria in response to the *Zbley* decision: This is particularly disturbing, since the team seems to be calling into question the criteria upon which the Supreme Court provided such specific and excellent guidance. The report ignores the Court's instructions to the agency to address the aspects of daily life for children which correspond to work for adults. The team seems to have forgotten the advice of the expert panel on childhood disability to avoid mathematical percentages or formulas in assessing how much delay or deficit should be considered disabling. It is discouraging for the agency to be so quick to dismiss the panel's work and the instructions of the Supreme Court. Such action would call into question the stability of any proposals.

Overall, the CCD task force believes that the proposed changes in the disability decision methodology constitute a fundamental change in the basic definition of disability. Even though the agency is not proposing a change to the statutory definition itself, we believe that this process reengineering effort is not the appropriate time or place to conduct the thorough review of the definition of disability that is necessary for a comprehensive and successful modernization of eligibility criteria in the Social Security programs.

Any proposals of this magnitude to revise the definition, whether through statute or regulation, should be subjected to a careful analysis of the effects on people with disabilities and a realistic assessment of the true meaning of disability. Such an effort is deserving of the full attention of policymakers and consumers, and should not take place in the context of an effort to streamline an administrative process.

Thank you for this opportunity to testify.

[The prepared statement follows:]

**STATEMENT OF MARTHA E. FORD
COCHAIRPERSON
CONSORTIUM FOR CITIZENS WITH DISABILITIES**

On behalf of the Consortium for Citizens with Disabilities Task Force on Social Security, I want to thank the Subcommittee for this opportunity to testify regarding the Social Security Administration's proposal to restructure the disability determination process.

CCD is a working coalition of over 100 national consumer, advocacy, provider, and professional organizations which advocate on behalf of people of all ages with physical, mental, and sensory disabilities and their families. Since 1973, CCD has advocated for federal legislation, regulations, and funding to benefit people with disabilities.

My testimony today represents initial reactions of the CCD Social Security Task Force to the SSA Reengineering Team's proposals. Due to the timing of this hearing, the Task Force has not yet completed its analysis of the reengineering proposal. We expect to complete a thorough analysis and submit extensive comments to SSA Commissioner Shirley Chater by the end of the public comment period. In addition, we will submit our complete comments to this Subcommittee.

ENTRY AND INTAKE

Upon initial review of the proposed changes in the procedures for entry and intake into the system, we believe that the Reengineering Team has indeed moved toward a substantial restructuring and improvement in the process. The proposed streamlining of the number of agency employees who handle a claim and the empowering of front line disability claims managers to work with claimants, gather evidence, and make initial decisions could result in more efficient and improved service to claimants. Reduction in the time exhausted while claimants wait for an initial decision, and for decisions regarding appeals, is long overdue.

In addition, the proposals for informing claimants about the basics of the system and requesting their assistance in developing evidence should help to reduce waiting periods. Using multiple formats for information dissemination will also be key in ultimate success of the restructuring.

For the above to be successful, training of the new disability managers will be critical as well as availability of on-line computer programs which assist in claims development. Further, it will be important to ensure that a wide variety of formats for contact with claimants be in use, including videos, phone, in-person, mail, and electronic mail. These systems must be made accessible, not only to accommodate people's varying disabilities, but also to accommodate multiple languages.

REDEFINING DISABILITY THROUGH THE PROCESS REDESIGN

During SSA's first public presentation of the reengineering efforts to the Save Our Security Coalition, members of the CCD Task Force raised concerns regarding the failure to include consumer advocates on the Reengineering Team. We believed that, regardless of the number of outside consumers consulted, it would be critical to include disability consumer advocates in the day-to-day brainstorming and review of proposals so vital to the team's reengineering efforts. It is possible that the failure to include the consumer voice is at least partially responsible for what we believe is a major flaw in the Reengineering Team's work: the proposal to redefine disability through changes in the disability determination methodology and the heavy, and misplaced, emphasis on the Americans with Disabilities Act (ADA) for assessing disability.

The new process would encompass several changes which have the potential for devastating the notion of disability as it has evolved over time. These proposed changes include:

- (1) replacing the Listings of Impairments with an Index of Disabling Impairments which incorporates an inappropriate use of ADA criteria, including removal of any functional criteria from the Index;
- (2) SSA's plan to develop a baseline of occupational demands as the standard for evaluating the ability to perform substantial gainful activity including consideration of "any reasonable accommodations that employers are expected to make" under the ADA; and

(3) the apparent intention to revisit, so soon after promulgation, the extensive work of the agency in developing the childhood functional impairment criteria in response to the *Sullivan v. Zebley* Supreme Court decision.

The final point is particularly disturbing since the Reengineering Team seems to be calling into question the criteria upon which the Supreme Court provided such specific and excellent guidance. Our initial concerns regarding each of the above issues follow.

Overall, the Task Force believes that the proposed changes in the disability decision methodology constitute a fundamental change in the basic definition of disability. Granted, the agency is not proposing a change to the statutory definition. However, the proposed changes in the regulatory scheme for determining disability would constitute a major change in the characteristics and number of people who could be determined disabled. We believe that this system/process reengineering effort is not the appropriate time or place to conduct the thorough review of the definition of disability that is necessary for a comprehensive modernization of eligibility criteria in the Social Security programs.

A number of CCD Task Force member organizations have been calling for just such a broad review and revision to address the evolving understanding of disability. Such an effort must be carefully undertaken in partnership by policymakers within the administration, in the Congress, and in the consumer advocacy community with a full understanding of the potential implications for individuals with severe disabilities.

Over time, as society's understanding of disability has improved, the regulatory and statutory approaches to defining disability in the Social Security and Supplemental Security Income programs have evolved and improved while the basic statutory definition has remained more static. Important examples of these evolving approaches include the establishment of the Section 1619 program (which recognizes that some people are able to work despite continuing severe disability with necessary supports) and the inclusion of functional assessment criteria in the mental impairment listings (a recognition that disability cannot always be determined by diagnosis alone). Further evidence of the changing understanding of the nature of disability has been this Subcommittee's own interest in previous hearings and testimony concerning the need to update the definition of disability and the request by the Subcommittee and Full Ways and Means Committee to the National Academy of Social Insurance to study this, among other issues. Through its proposal, however, the Reengineering Team ignores the evolution of the definition of disability and returns to an interpretation of the statutory language which is no longer accepted by medical or vocational experts. We believe that the following discussion regarding the specific concerns referenced above will help to illustrate the difficulties inherent in redefining disability and, therefore, the need to proceed with extreme caution in a separate policy context.

(1) The advocacy community has viewed the inclusion of functional criteria within the mental impairment listings as a major improvement in the system for determining disability. In fact, recently, SSA officials were publicly discussing their intention to address functional issues in the scheduled revisions of each of the listings, where appropriate. The Reengineering Team's approach in eliminating functional aspects of the listed disabilities would be a step backward in applying our understanding of various disabilities and their consequent limitations.

Further, the Reengineering Team has proposed to inject the notion of a "reasonable accommodation" into the basic definition of each disability to be included in the new Index.

The index will describe impairments that will result in death or impairments that are so debilitating that any individual would be unable to engage in substantial gainful activity regardless of any reasonable accommodation that an employer might make in accordance with the Americans with Disabilities Act. (p. 39) (emphasis added)

Under a literal interpretation of the above and given the vast range of reasonable accommodations that might be required by the ADA (because of the varied needs of individuals and because the ADA defines "reasonable" based upon the individual characteristics of the employer), it would be difficult to describe a disability which could be included in this new Index. It appears that the Reengineering Team lacks a fundamental understanding of the potential interaction between the requirements of the ADA and the requirements of the Social Security disability programs and the resulting potential impact on people with disabilities.

In a June 1993 memorandum to administrative law judges and associated hearings and appeals staff, SSA Associate Commissioner for Hearings and Appeals Daniel Skoler wrote: "In summary, we must remember that the ADA and the disability provisions of the Social Security Act have different purposes, and have no direct application to one another." His memo

discusses that and numerous other complex, related issues which should be fully addressed in any future revision of the definition of disability.

(2) The injection of the ADA reasonable accommodation standard into the fourth step of the evaluation of disability may further indicate a basic misunderstanding of the relationship between the ADA and the disability standards under the Social Security Act. Essentially, the ADA is a civil rights law. The Social Security Administration is not charged with enforcement over employers under the ADA. Therefore, to establish a standard which assumes reasonable accommodations for the purpose of establishing eligibility for Social Security disability programs may potentially establish barriers for the individual by, in effect, shifting the employer's burden of compliance with ADA onto the claimant or potential employee.

In establishing the functional activities that comprise an appropriate baseline of occupational demands, SSA will ensure that: ... 3) the baseline of occupational demands that becomes the standard for evaluating the ability to perform substantial gainful activity considers any reasonable accommodations that employers are expected to make under the Americans with Disabilities Act. (p. 42) (emphasis added)

Two interpretations are possible: the SSA Reengineering Team was unaware of the substantial negative impact the proposed standard would have on claimants or the proposal is a deliberate attempt to significantly and fundamentally change the disability definition and reduce the number of people who could potentially be found eligible. Regardless of intent, the potentially drastic consequences of this proposed shifting of the burden to the claimant require that this aspect of the proposal be rejected.

Even if the ADA references were removed from the proposal to create a baseline of occupational demands, the CCD Task Force questions whether the baseline concept is feasible, given the vastness of the economy and the potential expense of such an effort, and whether SSA would reasonably be able to constantly maintain the timeliness of the baseline.

(3) Finally, regarding the intent to revisit the extensive expert work done in devising the childhood functional disability criteria, the CCD Task Force disagrees with the report's characterization of the current system: that it "may not appropriately define how much functional loss or interference with growth and maturity is comparable to inability to perform any substantial gainful activity". The report ignores the Supreme Court's instructions to the agency to address the aspects of daily life for children which correspond to work for adults. The Team seems to have forgotten the exhortations of SSA's own expert panel on childhood disability to avoid mathematical percentages or formulas in assessing "how much" delay or deficit it takes to be considered disabled.

The work of the 1990 childhood disability expert panel represented the best thinking of the time regarding the development of children and the assessment of disability in children. It is discouraging for the agency to be so quick to dismiss the panel's work and the instructions of the Supreme Court. If the expert panel's work, and the regulations which resulted from it, can be dismissed so lightly, then the stability of any proposals, including those put forward by the Reengineering Team, are called into question. Further, SSA should remember the efforts to develop the childhood functional criteria and the difficulty in coming up with an objective standard when it considers something so extensive as the proposed baseline of occupational standards.

Any proposals of this magnitude to revise the definition of disability, whether through statute or regulation, should be subjected to a careful analysis of the effects on people with disabilities and a realistic assessment of the true meaning of disability, including for those who are able to work with necessary on-going supports. Such an effort is deserving of the full attention of policymakers and consumers and should not take place in the context of an effort to streamline an administrative process.

CONCLUSION

In conclusion, the CCD Task Force on Social Security urges a halt in any effort to redefine disability through regulations during this process redesign. On the other hand, we urge SSA to continue to move forward in its efforts to streamline the claims process itself.

There are several other areas addressed by the reengineering team which will require the CCD's attention, including evidentiary development, the administrative appeals process, quality assurance, measurements, and the new process "enablers". The Task Force will review the proposals in these areas from the perspective of people with disabilities and considering whether the proposals would enhance the disability determination process while respecting the rights and concerns of the individuals involved.

Finally, the CCD Task Force must take this opportunity to once again point out that, in order for the Social Security Administration to adequately carry out its statutory mandates, it must have adequate administrative resources. Process reengineering alone will not solve the problems of the agency regarding the massive backlog in disability determinations. Reengineering is a step. It will not be accomplished overnight. In the meantime, it is imperative that the administration request and be given adequate resources to serve people who are entitled to benefits under the law.

As stated above, the Task Force will provide this Subcommittee with its final comments as submitted to the Social Security Administration. Thank you for this opportunity to testify.

Mr. PICKLE [presiding]. Thank you, Ms. Ford.

We will now hear testimony from Matthew Diller, associate professor of law, Fordham University School of Law.

Mr. Diller.

STATEMENT OF MATTHEW DILLER, ASSOCIATE PROFESSOR OF LAW, FORDHAM UNIVERSITY SCHOOL OF LAW, NEW YORK, N.Y.

Mr. DILLER. Thank you for the opportunity to testify today. I have been an observer of the Social Security Administration for a number of years, and I have been an attorney with the Legal Aid Society in New York City, where I handled a number of class action lawsuits concerning the Social Security Administration's policies for determining disability.

First, let me start by saying that I would like to commend the agency for this report and for its enormous efforts to rethink its processes. There is clearly much that is wasteful in the agency's processes and, in fact, harmful to those whom the agency is supposed to serve. I appreciate their efforts to tackle these problems.

I also appreciate the team's consultation with a broad spectrum of the public. I am also glad to hear today that Social Security expects this dialog to be continuing and expects to receive further input from the public.

First, let me say that, with respect to the proposals concerning the disability determination process, I think they form a good starting point for looking at the whole process. In particular, I think that the proposal to eliminate the reconsideration step of the disability process is a good one, because the reconsideration step takes a lot of time, but corrects few errors.

I am also heartened by the proposal to provide an opportunity for a person-to-person interview prior to the denial of any disability claim. I think that such an interview would provide more accurate results at the initial level. It would provide outcomes that are more acceptable to the claimants who appear before the agency. Also, it would bring the initial and appeals levels closer together and, therefore, would reduce the disparity in outcomes between them.

On the other hand, I am troubled by a number of the proposals in the section entitled "Disability Methodology." In particular, while it is apparent that there are severe problems with the disability determination process, it is less apparent that there are such severe problems with the methodology itself. The report does not document what problem it is trying to fix in this area. The result of this lack of clarity in identifying the problem is that many of the proposals in the report provide inadequate or no explanation for why they would be an improvement over the current system.

Let me just give you an example of a few of the things that I am concerned about. The report proposes to eliminate the heart of the current system for evaluating disability, which is the evaluation of whether there are jobs that exist in the national economy for which the claimant is qualified, in light of his or her impairments and his or her particular vocational characteristics, such as age, education and work experience.

The report proposes a system that essentially focuses on the functional capacity of the claimant alone, without considering age,

education and work experience, except to a very limited extent. First of all, I think that this proposal is beyond the original mandate of the reengineering task force, which was not to touch the basic definition of disability. Instead, the proposal really would exclude vocational characteristics from the process almost entirely. Of course, the consideration of those characteristics are mandated by the statute.

For example, the new system, by looking only at the functional capacity of the claimants, would place the 25-year-old claimant with many job skills and advanced education on the same scale as the 55-year-old claimant with few job skills and only a limited education. It is hard to see how there could be a scale that would be both fair to the 55-year-old in that situation, without being overly generous to the 25-year-old, or which would be appropriate for the 25-year-old, without being too harsh for the 55-year-old.

Instead, we now have a system that has a number of scales that is designed to reflect the fact that different claimants have different characteristics. So we now have a grid system which is designed to allow the agency to consider all of these factors. This grid system is based on jobs and job requirements as identified by the Department of Labor. In fact, in 1992, Social Security reevaluated the grids and determined that they continue to be accurate as an empirical matter. There is nothing in this report that suggests that there can be an empirical basis that would support this unitary standard that is proposed.

I am also concerned about the use of the ADA here. I am particularly concerned that the use of the ADA proposed in the report would violate the congressional standard. Should I explain that or stop?

Mr. PICKLE. That is the bell. Have you finished?

Mr. DILLER. Let me just finish and say that I am concerned that the use of the ADA would violate the statutory standard of disability. The proposal would have the agency looking at jobs that should exist in the national economy, if the ADA were complied with, rather than jobs which do exist in the national economy. We would have a situation where the agency would deny benefits to someone on the grounds that there should be jobs out there they could go get, at the same time that employers are saying that these claimants are not qualified for those jobs. The effect would be to place claimants in a worse situation because of the ADA, than if it had not existed.

I agree that the ADA should and will reduce the costs of the disability insurance program, but it will do so and should do so by compliance with the ADA, not assumed compliance.

Thank you for the opportunity to testify.

[The prepared statement follows:]

TESTIMONY OF PROFESSOR MATTHEW DILLER, FORDHAM UNIVERSITY SCHOOL OF LAW, ON THE PROPOSAL OF THE DISABILITY PROCESS REENGINEERING TEAM TO RESTRUCTURE THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY DETERMINATION PROCESS

BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY, OF THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS AND MEANS

April 14, 1994

Good morning. My name is Matthew Diller, I am an Associate Professor of Law at the Fordham University School of Law in New York City. I have been an observer of Social Security Administration for a number of years and represented claimants for disability benefits as a Legal Aid attorney. The project of rethinking the Social Security disability program is eminently commendable. Claimants, administrators and observers can all agree that there is much that is wasteful and inefficient about the process by which our government determines who is entitled to disability benefits. Accordingly, I commend the Social Security Administration for undertaking the enormous task of rethinking the ways in which the agency does business. I also appreciate the fine work of the Disability Process Reengineering Team in consulting with hundreds of recipients and consumer advocacy groups around the country.

Reengineering the Disability Determination Process

The Team's proposals concerning the redesign of the procedures by which disability determinations are made and reviewed administratively provide an excellent starting place for the formulation of a new administrative process and are reflective of the broad public input that the Team solicited. A number of the core proposals achieve the goals of both enhancing efficiency and creating a process that is more fair to those who seek benefits. For example, the elimination of the reconsideration level of review will both ease the administrative burden on the agency and enable claimants to proceed through the process more quickly, with little or no loss of meaningful scrutiny of claims. The reversal rate at reconsideration is not high enough to justify the requirement that claimants spend months going through the process before requesting a hearing.

Similarly, the creation of the job of "disability claims manager" is an intriguing idea. The creation of a system which enables claimants to deal directly with agency personnel who are thoroughly familiar with the standards and procedures by which disability is determined would be a major step forward. Additionally, the requirement of an interview with the adjudicator prior to the issuance of a denial decision would lead to more accurate results and would make adverse results more acceptable to claimants. Such a procedure would be a radical departure from the current system in which disability determinations are made by disability analysts whom claimants never meet and who work in state offices which claimants never see. The requirement of an interview prior to the denial of a claim will also bring the procedures at the initial level of determination and the administrative hearing level closer together. As a result, it can be expected

that the disparity between initial outcomes and outcomes on appeal would diminish.¹

I also commend the Team on its recognition that the de novo non-adversarial evidentiary hearing should be retained. While the number of requests for hearings may well decline due to the improvements in the initial level of review, the availability of a de novo hearing is still essential to ensure the fairness of the process.

Reengineering the "Disability Decision Methodology"

Although phrased as reform of the decision-making "methodology," the Team has also proposed what amounts to a major overhaul of the standards for receiving disability benefits. Under the guise of administrative reform, the Team proposes changes in the evaluation process that would change the outcomes of thousands of cases. I find many of these proposals to be troubling and I hope that this Subcommittee asks a number of tough questions regarding them.

Most dramatically, the Team proposes to eliminate the heart of the current five step sequential process, the comparison between the claimant's residual functional capacity and the existence of jobs that the claimant can perform in light of his or her age, education and work experience. In place of this comparison, which is now undertaken with the assistance of the agency's Medical Vocation Guidelines ("the Grids"), the Team would lay down a blanket rule that all claimants found capable of a "baseline" of work would be denied benefits. The Team compares this baseline to the current category of unskilled sedentary work. The only exception to this principle would be for claimants "nearing full retirement" age.

The viability of such a system depends upon the existence of a single category of work against which all claimants can be assessed. For many years the agency has relied on four categories of work (sedentary, light, medium and heavy) in order to take into account the fact that the impact of an impairment on a claimant's employability is dependent upon the individuals vocational characteristics. Under the agency's "Grids," a 25 year old individual with substantial educational attainment and work skills who is capable of sedentary work will be denied benefits, but a 55 year old individual who can perform the same sedentary work may be found disabled if his or her vocational characteristics are adverse and his or her impairments preclude the performance of "light" work. This disparity in outcomes reflects the fact that a 25 year old with a favorable vocational profile may considered qualified for certain desk jobs, but that a 55 year old with limited education and no relevant experience would have a more difficult time adapting to the same jobs and would be less likely to be hired by employers. In this way, under SSA's current methodology, the differences in the claimant's vocational characteristics may yield different outcomes, even if the claimants have identical functional capacities.

In contrast, the approach proposed by the Reengineering Team would put the 25 year old and the 55 year old on the same scale, so that their

¹ Careful consideration should be given to the complexities which may result from combining the tasks of advisor and adjudicator in a single person. Acting as an advisor to the claimant, would the claims manager discourage the claimant from appealing the decision rendered by the claims manager in his or her adjudicative capacity? Would the claimant be misled into believing that the claims manager was a "friend," rather than an adjudicator?

disparities in age, education and work experience would be rendered irrelevant. It is difficult to conceive of a single "baseline" of work that would be fair to the 55 year old described above, without being overly generous to the 25 year old. Conversely, if the "baseline" were appropriate for the 25 year old, it would inevitably be too harsh when applied to the 55 year old.

The Team's proposal is troubling because it offers no basis for the apparent conclusion that it is possible to develop a single "baseline" category of work that will yield fair and accurate results for all claimants and offers only scant discussion of its proposal to jettison the current methodology. Despite the statutory requirement that SSA consider age, education and work experience in determining disability, the Team gives short shrift to the importance of these factors. The 55 year old searching for a job would certainly be surprised to hear that the Team believes he or she can be expected to adapt to new kinds of work to the same extent as individuals thirty years younger. In support of discounting age as a factor in making disability determinations, the Team cites only to the fact that in recent generations Americans work until later in life than in previous ones. This observation, does not support the conclusion that age no longer affects adaptability and has become irrelevant as a vocational characteristic.

Similarly, the Team discounts the impact of educational level on the ground that at the time a claimant applied for benefits, education is generally completed in "the remote past," and therefore not very significant. Once again, the Team cites no empirical support for the view that educational level is no longer important to determinations of disability.

In contrast, SSA's Grids which take into account various vocational characteristics and functional categories of work are based on empirical data collected by the Department of Labor. As recently as 1992, SSA has reassessed the continuing validity of the factual basis for the Grids and concluded that the Grids remain valid.² Moreover, the Grids are not time consuming or difficult for adjudicators to apply. Thus, there is no apparent need or advantage to reducing the three Grid categories of work to a single "baseline" category.³

In sum, the Team's proposal to drop or restrict consideration of vocational factors appears based on some concept of the "average" claimant. It would not provide for the individualized assessment of vocational

² See 57 Fed. Reg. 43005 (Sept. 20, 1992). This is not to say that the Grids are perfect. Many advocates for claimants believe that the Grids do not reflect the realities of the job market faced by younger claimants. This criticism, however, does not call into question the basic structure of the Grids.

³ One criticism of the Grids may be that they cannot be applied in all cases because "nonexertional" impairments are not taken into account in the formulation of the Grid categories. In such cases the Grids can only be used as a "framework" for decision, rather than a means of yielding conclusive results. While a proposal to explore incorporation of some nonexertional limitations into the Grid categories would be sensible, the problem does not justify jettisoning the Grids altogether. Moreover, since the "baseline" category of work proposed by the Secretary could not possibly take into account all limitations due to any kind of impairment, some residual mechanism for taking into account other kinds of limitations would be necessary in any event.

characteristics that the Social Security Act requires and that fairness demands.

With respect to claimants nearing full retirement age, the Team proposes a different approach. Under the proposal, SSA would evaluate whether the claimant can perform work he or she has done in the recent past. If the claimant cannot perform such past work, benefits would be awarded, on the theory that claimants nearing full retirement age cannot be expected to adapt to new jobs, even if they can perform the "baseline" category of work. However, if a claimant has not worked in the recent past, so that there is no recent past work to be assessed, the Team proposes to deny benefits to claimants who can perform the "baseline" category of work. The Team offers no reason for its conclusion that it is easier for a 64 year old who has not worked in 20 years to adapt to a new kind of work, than it would be for a 64 year old who has work experience. The distinction appears to be based on a moral judgment about which claimant is more worthy, rather than an objective measurement of disability.

I will highlight a number of additional proposals offered by the Team for which inadequate explanation is provided:

- * The Team proposes to reduce the number of impairments in the Listing of Impairments (to be renamed the "Index of Disabling Impairments"). It does not identify any advantage to such a reduction. To the contrary, the Listing saves the agency the time and effort of making difficult functional assessments in instances in which the claimant is clearly disabled.
- * Without explanation, the Team proposes to eliminate the concept of establishing disability through medical "equivalence" to the Listing of Impairments. This step currently serves the purpose of facilitating the award of benefits to individuals whose impairments are equal in severity to those in the Listing, but whose medical findings differ in some respects.
- * The Team proposes to reconvene a panel of experts to redesign the process of evaluating disability for children. No explanation is offered for why it is necessary to undertake the time-consuming and expensive task of overhauling the children's SSI program when a panel of experts did so less than three years ago.
- * The Team stresses the need to develop a standardized measure of functional ability, but does no explain how this method will differ from the current procedure for determining residual functional capacity, which is also a measure of functional ability. The Report implies that the measurement of functional capacity can be reduced to a scientific formula. Forty years of experience with the disability programs teaches that this is impossible and attempts to do so often exclude significant evidence of functional loss.
- * It appears that in determining whether a claimant is engaging in substantial gainful activity, the Team would drop any consideration of whether a claimant's earnings were attributable to special support available in a sheltered workshop. The Team has provided no reason for this change.
- * The Team would have the disability determination process assume that employers comply with the Americans with

Disabilities Act, even if they do not. In determining the "baseline" category of work that would be equated with substantial gainful activity, the Team proposes to factor in any reasonable accommodations that employers are required to make. Under current agency policy, SSA looks to the requirements of jobs that exist in the market-place without considering whether each of those requirements is lawful. Under the Team's approach, claimants could be denied benefits on the ground that jobs are theoretically available, even if employers would not consider them to be qualified. This approach uses the ADA to harm the very group that it is intended to protect and could violate the Social Security Act, in that it looks to jobs which should exist rather than jobs which do exist. While the ADA may well result in savings to the disability programs, such savings should be achieved through actual compliance with the ADA, rather than a blanket assumption of compliance by SSA.

As this discussion makes clear, a number of the Team's proposals would have a major impact on the substantive standards of eligibility for disability benefits -- there can be no doubt that the outcome of cases would change were the Team's proposals to be adopted. My point is not that such standards should be immutable, but only that they should not be altered without full consideration and debate as to what the standards for disability ought to be, and a full understanding of requirements of jobs in the national economy. The Team has presented little explanation and no factual support for its proposals on these issues.

I am also troubled by the Team's failure to explain the ramifications of many of its proposals in its report, particularly in light of the fact that many of the proposals are likely to result in restricting eligibility for benefits. Individuals should not find themselves eligible for benefits one day and ineligible the next without a persuasive explanation of why they should not receive disability benefits.

Lastly, I do not believe that the Team engaged in any effort to solicit public input into its proposals on the decision methodology. I was surprised by these proposals, because SSA never indicated that the reengineering process would encompass basic policy questions about who in our society should be considered disabled, and who should be found capable of substantial gainful activity. Instead, SSA stressed that reengineering would focus on the agency's procedures, rather than the product. Indeed, SSA distributed information assuring the public that the Reengineering Team would not examine the statutory definition of disability and would not "make it more difficult for individuals to file for and receive benefits."⁴ I also attended a regional meeting in New York City convened by the Reengineering Team to solicit the input of interested persons in the New York City area. At the meeting there was no discussion of the substantive standards of disability because participants were never told that the standards were under review.

I hope that this testimony is of assistance to the Subcommittee. I appreciate the opportunity to appear before you today.

⁴ Information about Process Reengineering at the Social Security Administration (Undated sheet distributed by SSA).

Mr. PICKLE. Thank you, Mr. Diller.

Mr. Tennant, we would now be pleased to hear from you. You are representing the ALJs. How do you plead this morning? [Laughter.]

**STATEMENT OF HON. DAVID P. TENNANT, TREASURER,
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.**

Judge TENNANT. Thank you, Mr. Pickle. I plead not guilty.

My name is David Tennant, of course, and I am representing the Association of Administrative Law Judges, which is our professional association.

We would like to extend our congratulations, first off, to the reengineering team and its chair, Rhoda Davis, and Commissioner Shirley Chater, for this redesign proposal. We support the effort made and we support much of the proposal itself.

However, the new process, in attempting to respond to the current problems, raises many questions, we feel. First, who is this adjudication officer and where does he fit into the process? We suggest that the proposal should clarify the qualifications and identify the adjudication officer as an attorney position. Prehearing responsibilities contemplated by the proposal include meeting with claimant's representatives, evaluating evidence, identifying issues in dispute and decisionmaking. These responsibilities should not be undertaken by anyone such as a hearing assistant or a paralegal who does not have legal training.

With regard to the adjudication officer's role, the proposed plan is silent in some rather key respects. It provides that the adjudication officer will have decisionmaking authority to grant a claim at the hearing level. This proposal obscures the lines of authority between the responsibility of the adjudication officer and the administrative law judge's decisionmaking authority.

We recommend that the authority of the adjudication officer terminate upon the filing of a request for hearing. A request for hearing should trigger a judge's jurisdiction, that is, decisionmaking by an independent entity protected by the Administrative Procedure Act. It should not trigger a decision by an agency employee called an adjudication officer. Therefore, after a request for hearing is made, the only person who should really render a final decision we feel is a judge, and a conclusion by the adjudication officer can only be a recommended decision to the judge, which would become final upon approval of the judge.

Second, we have some observations regarding quality assurance. We feel that quality assurance simply has no place in a judicial setting, when adequate means of appellate review are available. We agree with the Secretary that she should retain some authority to review final decisions and to establish policy.

However, the own motion pre-effectuation reviews by the Appeals Council to further its quality assurance program raises the specter of improper interference, in our minds. We remember with horror the pre-effectuation reviews conducted by the Appeals Council in the early 1980s under the name Bellmon review program. These reviews disguised as quality assurance were used by the agency to coerce judges into denying more cases. The new process looks suspiciously like the former Bellmon program. Quality assurance, we

feel, simply has no place in legal decisionmaking, where the remedy is appellate review.

A third area which bothers us, and I notice that it bothers the two other people on the panel today with me, is that of disability decision methodology. It appears that, despite the restrictive purview the proposal may have, through a curtailed index of impairments, abolition of medical equivalence, and the elimination of grids, among other things, it has altered the standard for finding disability, while purporting to leave the statutory definition intact. The proposal seems to embrace radical changes in the standard, but does so in terms so vague, that it is really difficult to assess its impact on current disability beneficiaries or future potential claimants.

With changes that are potentially this profound, a more prudent approach we feel would be to set up several pilot projects to ascertain the effects of these changes before going nationwide with them. This is such an important matter that it should be closely monitored by the Congress and implemented only after a statutory change.

We endorse the team's proposal to make the program more objective and uniform. On the other hand, disabled individuals are just that. They are individuals, and not everyone can be put into an objective assessment. Their disabilities do in fact involve subjective problems. Pain, for example, is simply experienced differently by different people. This cannot be a system of cookie cutter justice. Claimants are individuals who, more often than not, fall outside the standard, rather than within.

In conclusion, we reaffirm our congratulations for a tremendous job. We look forward to working with the committee and the agency in the future to provide our disability customers with not just good service, but world class service.

Thank you for allowing me to make this presentation.

[The prepared statement follows:]

**STATEMENT OF DAVID P. TENNANT
TREASURER
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.**

I. Introduction

My name is David P. Tennant. I am an administrative law judge who for the last fourteen years has been assigned to the Office of Hearings and Appeals [hereafter "OHA"] of the Social Security Administration in Raleigh, North Carolina.

I appear before you in my capacity as the Treasurer of the Association of Administrative Law Judges, Inc., which is a professional organization having the stated purpose of promoting full due process hearings in adjudication of controversies within the Social Security Administration and the Department of Health and Human Services.

II. Disability Process Redesign

The Proposal from the SSA Disability Process Reengineering Team

We extend our congratulations to the Disability Process Reengineering Team, its chair, Ms. Rhoda Davis, and Commissioner Shirley S. Chater, for the redesign proposal issued April 1994. The project undertaken by the Team was monumental and the proposal reflects its' members' dedication and sincerity in redesigning the program to ensure the American public is well served by its government. We support the effort made, and we support much of the proposal itself. It is clear that the Team took many points of view, including ours, into consideration. We recognize that when constructive proposals for change are put forth, it is all too easy for "Monday morning quarterbacks" to criticize and second-guess, and that no sweeping proposal can [or should] satisfy each and every interest. We take this opportunity to assess the proposal from the judges' point of view, not to undermine the tremendous effort made by the Administration.

We wish to make it clear that the overriding concern of the administrative law judges is to assure justice for both the claimant and the Secretary. We have reviewed the proposal in that light. Many of the key aspects of the proposal go far to assuring fairness and proper service to the claimants and the public, and we strongly endorse them:

- creation of one standard for all levels of decision making
- elimination of unnecessary levels of adjudication
- elimination of multiple handlers, and provision of one point of contact
- freeing of professionals such as the judges from tasks inconsistent with their training and skills [particularly development responsibility]
- compression of the time from application to determination or decision
- education of the public
- placing responsibility on claimants and attorneys, and acting in partnership with them in developing the claim
- elimination of the "severity" step in the evaluation
- recognition that vocational factors should account for generational changes over time in the workforce
- concordance with the Americans for Disabilities Act
- elimination of the medical-vocational rules
- closing the record after hearing.

The suggested new process, in attempting to respond to current problems, raises many new questions. This statement will address six areas which, in the view of the administrative law judges [hereafter ALJ] must be considered before moving ahead to implementation. These are:

1. The role of the adjudication officer [hereafter "AO"]
2. The impact of Quality Assurance ["QA"] on judicial decision making, and the role of the Appeals Council ["AC"] therein
3. The quality of the evidence.
4. The disability decision methodology
5. The impact of the new process on the workforce.
6. Policy decisions required by the change

III. Discussion

1. **The role of the adjudication officer.** The redesign proposal provides that the AO "will conduct all prehearing proceedings" [p. 53]¹. It is this proposal which, in our view, raises two key unanswered questions. The Association supports the concept in general, in that it is by and large consistent with proposals made by the Association and the American Bar Association for a legal decision-making entity early in the process. However, it is unclear from the proposal:

- a. whether the AO is an attorney; and
- b. where the AO fits in the new process.

a. **With respect to the AO's qualifications,** the document specifies that the "adjudication officer will have the same knowledge, skills and abilities as the adjudicators who decide claims initially" and will "also have specialized knowledge regarding hearings and appeals procedures." At the same time, the AO is authorized to make decisions to award benefits. We note that disability claims have an average actuarial value of \$90,000 and thus have significant financial impact on both the individual and the public interest. With such interests at stake, the AO must be an attorney who has skills in evaluating evidence and making decisions according to proper legal standards. We recommend that the AO have *greater* skills than those who decide the claim initially. The AO must, at a minimum, have the same knowledge, skills, and abilities as those who decide the claims initially. However, these skills, while necessary, *are not sufficient* to qualify a person to make legal decisions. If the AO is not an attorney, a legal decision by the AO would be a relatively empty exercise. If the AO is not an attorney and merely has the same skills as the disability claims manager [hereafter "DCM"], why bother having an interim step between the DCM and the ALJ?

We suggest that the proposal clarify the qualifications and identify the AO as an attorney position. Prehearing responsibilities contemplated by the proposal include meeting with claimants' representatives, gathering and evaluating evidence, identifying issues in dispute, and decision making. These responsibilities should not be undertaken by anyone, such as a hearing assistant or paralegal, who does not have legal training. We further recommend that qualified senior staff attorneys from the current OHA fill this position. At the

¹ Page references in this statement refer to the Team's 132-page document entitled "Disability Process Redesign: The Proposal and Background Report from the SSA Disability Process Reengineering Team" dated March 1994, SSA Pub. No. 01-002

present time, these professionals are being used primarily to draft decisions. Employing them as AOs will make better use of their experience and talents. [The current OHA decision writer function can be performed by attorney law clerks, as in the Department of Labor model, rather than career staff attorneys.]

b. Regarding the AO's role in the process, the document is silent in some key respects. The AO's proposed role is largely prehearing. In particular, it is unclear where the lines of authority begin and end. A long-standing issue in Social Security has to do with agency decision makers versus independent decision makers. Where does the AO fit within this picture? Is the AO fish or fowl -- independent or agency? As we understand it, the proposed process contemplates that the AO's role begins upon the filing of the request for hearing, which suggests he or she is at OHA. An argument can be made that the claimant should not have to request a hearing to obtain an initial decision that is based on BOTH medical and legal factors: that service should be provided to the claimant upon the filing of an application. We set forth below two possible alternative scenarios concerning the role of the AO:

i. **The AO at initial determination level.** The effect of such a configuration is to take the proposed three-step process [DCM to AO to ALJ], and make the second step earlier.

The Association, in its recent submission² to the Reengineering Team, recommended that the initial decision at the agency level be an integrated two-part process: the first primarily medical, the second legal. It is within this framework that the Association's proposal foresaw an attorney role, which we termed a "legal development specialist." The purpose of doing so was two-fold: first, to assure that the claimant had received a FULL adjudication of his or her application; and second, that it take place at the earliest stage. One can argue that a claimant should not have to take an appeal in order to receive both a medical and legal determination. Under this scenario, if the DCM decides to deny a claim, it should automatically be handed off to the AO without requiring a request for hearing. This assures that claimants will receive a fair adjudication early on. Because AO's are not independent fact finders, an adverse decision at this level will not deprive the claimant of due process before an independent decision maker: the administrative law judge.

All of the development responsibilities ascribed to the AO in the new process can and should be carried out by or under the supervision of the AO at this initial level. Specifically, "prehearing" development need not await a request for hearing. The attorney/AO must be satisfied that the evidence supports his or her conclusion to grant or deny, and this would require full development of the claim in any event. If the decision is to deny, the claimant has received a full and fair decision, albeit by non-independent agency employees.

At the point of denial, the AO would assume the role proposed by the Reengineering proposal: to advise the claimant regarding prehearing proceedings and hearing rights; to meet with counsel [if any], to narrow the issues for hearing, and the like. The AO, having worked the case, is now in the best position to defend the agency's decision. Therefore, we recommend that the AO be authorized to present the agency's position at hearing under appropriate circumstances. Additionally, the ALJ must have remand authority to the AO in the event that further development is needed after appeal to the ALJ, or upon remand post-hearing.

Perhaps a better approach to be considered in reengineering, then, is to build a team at the initial determination level consisting of the DCM and the AO [with appropriate support staff]. This will have no impact whatsoever on determinations favorable to the claimant, and will shorten the process on denial determinations, which under this scenario should be better prepared for ALJ review.

² This submission consisted of a resolution adopting the report and recommendations of the National Conference of Administrative Law Judges of the American Bar Association.

ii. **The AO at hearing level.** The proposal provides that the AO will have decision making authority [to grant a claim] at the hearing level. This proposal obscures the lines of authority between the responsibility of the AO and the ALJ's decision making authority. We are concerned that this lack of clarity will result in conflict over case management at the hearing level, unless there are clear distinctions between the job responsibility of the AO and the APA-protected jurisdiction of the ALJ. We recommend that the authority of the AO terminate upon the filing of a request for hearing. A request for hearing triggers ALJ jurisdiction, that is, decision making by an independent entity pursuant to the Administrative Procedure Act. It does not trigger a decision by an agency employee called an AO. Therefore, after a request for hearing is made, the only person who can render a final decision is an ALJ. Any conclusion by an AO can only be a recommended decision to the ALJ, which becomes final upon approval of the ALJ. Therefore, the AO cannot have decision making authority at the hearing level without supervision of an ALJ.

We make a distinction between the AO's decision making authority at the initial level versus the hearing level because ALJs are appointed pursuant to Section 3105, Title 5 U.S.C. of the Administrative Procedure Act [APA], entitling both the claimant and the Secretary to a full and fair hearing by an independent fact finder upon the filing of a request for hearing. Nothing in the reengineering proposal purports to amend the APA, yet in essence the proposed AO position may do just that. We strongly oppose amending the APA, which affects litigants in every agency of the United States.

On an management note, we strongly oppose the implied authority of the AO to schedule cases for the ALJ. This provision is inconsistent with the realities of hearings offices, whose judges hear cases not only at home but at remote sites. In these offices considerable care must be devoted to creating a travel docket to make the best use of the judge's time and travel budget. The best use of the agency's travel budget and of a judge's time is to schedule a number of cases at a remote site, which may be inconsistent with an AO's scheduling entries and a 45 day time limit. It is also inconsistent with the judges' responsibility to hold a quality hearing. Judges must review a case prehearing to assure that it is fully ready for hearing. For example, if a judge finds that a case has been scheduled [probably hurriedly] on the 45th day, he or she may be precluded from calling the appropriate expert witnesses. It may also result in a rag-tag type of schedule, sending the judge from Brooklyn on Monday, to Hoboken on Tuesday, back to Brooklyn for Wednesday and to Hoboken the next day.

2. Quality Assurance, the Appeals Council, and how they work together.

With respect to Quality Assurance [hereafter "QA"], we have several caveats. Quality assurance has no place in a judicial setting, when adequate means of appellate review are available. The proposal states that quality assurance will "include comprehensive review of the **whole** adjudicatory process ..." [pp. 57-58, emphasis in the original]. We note also that the proposed process contemplates a "customer satisfaction" standard. Inherent in litigation is the fact that the parties have a dispute they cannot settle, and that they want someone to resolve it for them. One of the parties will necessarily be disappointed with the outcome. It is dangerous, therefore, to rest quality measurement on a "customer satisfaction" standard. We suggest that if more correct decisions are to be made earlier in the process, and the cases are better prepared, one can anticipate more denials by ALJs. Therefore, how much claimant satisfaction will there be with ALJs?

We are also very concerned with the proposed use of "cost, productivity, pending workload, and accuracy" [p. 59] as measures of quality in a judicial setting. Quality in legal decision making means and has always meant impartial fact-finding, application of the proper standard, appropriate demeanor, and a reasonable degree of diligence in managing one's docket. These are measures most suited to professional, peer review [such as that set forth in S. 486] rather than quotas and timelines.

Concerning the role of the Appeals Council, we concur that the Secretary must retain the authority to review final decisions and to establish policy. However, the "own motion," pre effectuation reviews by the Appeals Council to further the Quality Assurance program [pp. 55] raises the specter of improper interference. To those unfamiliar with the recent

history of SSA's relationship with its ALJs, this QA proposal might appear harmless. However, the ALJs in our Association remember the Bellmon Review Program of the early 1980's with horror. In that program, ALJs with individual allowance rates of 70% or more were targeted for review by the Appeals Council on its own motion -- under the guise of making sure those judges' decisions were consistent with SSA laws, regulations and policies -- while in fact, it was to pressure judges to issue fewer allowance decisions [it is interesting to note that the ALJ overall allowance has just climbed over 70%]. Our Association litigated this matter [*Association of Administrative Law Judges, Inc. vs. Heckler*, 594 F.Supp. 1132 (D.D.C. 1984)] and the Court agreed with our position, stating as follows:

The evidence, as a whole persuasively demonstrates that the defendants retained an unjustifiable preoccupation with allowance rates, to the extent that the ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been largely on subjective factors, as a matter of common sense that pressure may have influenced some outcomes.

If this were the real end of the story, perhaps the Association's concern would be questionable at this time. However, this new process looks suspiciously like the former Bellmon program.. Quality assurance has no place in legal decision making, where the remedy is appellate review. In our judgment, the danger inherent in quality assurance programs which purport to measure judicial decisions is that factors extraneous to the established system of justice will affect the final result.

We concur that the Secretary may properly, through the Appeals Council, review on its own motion and where an appeal to federal court has been taken. However, we note that the "own motion" review described in the proposal does not provide for any protection of the claimants' rights. We believe that the claimant is entitled to due process upon "own motion" review of a favorable decision, to protect their rights in the case. Additionally, where the Appeals Council decides to remand to the ALJ, the ALJ in turn must have remand authority to the AO, where the primary prehearing development responsibility lies.

We applaud the Team's proposal to close the record at the ALJ level and to provide direct appeal to federal district court. This measure should bring finality to a system that has been plagued with circularity. In this regard, we support the establishment of an appellate process as envisioned in H.R. 3265, to bring uniformity to this national program.

3. Quality of the evidence.

We agree with the numerous comments to the effect that under the current process, the medical evidence provided often fails to address the disability issues to be decided. In an attempt to address this problem, the proposal provides for two things: a standardized set of measurement criteria; and a standardized medical report form that provides diagnostic and functional information primarily from a treating source. We discuss below the proposal's attempts to reduce subjective factors in the disability determination process. As to the standardized medical report, we are very concerned about the potential for misuse or abuse. We and the agency have considerable experience with standardized forms, such as those used by state welfare offices or workers compensation programs. All too often, the data recorded in the form are not borne out by the actual treating records. We are concerned that the treating physician may simply ask the claimant [or representative] to fill out the form for the doctor's signature, or that a doctor sympathetic to his patient may provide an assessment that is more favorable to the claim for benefits than the records would suggest. The goal of medical treatment is to provide a diagnosis and treatment, not functional assessments; while the Team's goal of arriving at a standardized form that will be "easy" for physicians to use is laudable, it is difficult to understand how it can be accomplished, and to understand what value it will have without records that corroborate it. The Social Security Administration itself currently recognizes the need for quality evidence by requiring longitudinal proof, rather than simply a snapshot [for example, in mental claims]. The finder of fact must have the opportunity to assure that the conclusions in the report are supported by the medical records.

As judges, it is and has historically been our duty to assure that evidence is authentic and reliable.

We also note that obtaining medical records has historically been, and is likely to remain, a lengthy and frustrating process. However, we view it as extremely important. In our view, the quality of the evidence is key to assuring a quality determination in the first instance. A quality decision is so important to the claimant and to the public that a certain delay will have to be tolerated. When it is a question of the evidence, quality is more important than speed.

In addition, while treating physicians are the primary source of evidence, they are not the only source. On occasion, consultative examinations will need to be obtained. Our experience with consultative examinations is that they are of very uneven quality. The agency has often been strapped for funds and unable to order the best examination or the best reports. We strongly support additional training for consultative examiners. Moreover, while a standardized functional assessment form will be helpful for these examiners, we recommend that a narrative report be required as well, for the same reason that treating records are needed, to verify the assessment.

4. Disability decision methodology. The Association acknowledges that it is not the function of administrative law judges to establish either the law or agency policy. We recognize the responsibility of both the Congress and the agency in these functions. However, for purposes of this hearing, we offer our observations on the proposed changes in the disability decision methodology, because the process of assessing disability can very much effect not only individual results but overall policy. We set forth below our experience with respect to the assessment of disability.

It appears that despite its restricted purview, the proposed process may have, through a curtailed index of impairments, abolition of medical equivalence, and elimination of the grid, among other things, altered the standard now in place for finding disability while purporting to leave the statutory definition intact. The proposal seems to embrace pervasive and radical changes in the standard, but does so in terms so vague that it is difficult to assess its impact on current disability beneficiaries or potential future claimants. For example, the new concept of baseline occupation apparently eliminates the vocational factors of age, education and work experience now required by the statute. See 42 U.S.C. Section 223(d)(2)(a). With changes that are potentially this profound, a more prudent approach would be to set up several pilot projects to ascertain the effects of these changes before going nationwide. For example, control studies of the results of "before" and "after" processes should be established. This is such an important matter that it should be closely monitored by the Congress and implemented only after statutory change. The Congress may indeed wish to endorse such changes, and we take no position on their wisdom. However, we alert this committee that they are possibly significant inroads on eligibility.

We endorse the Team's proposal to make the program more objective and uniform. On the other hand, disabled individuals are just that -- individuals -- and not everyone can be put into an objective assessment. Their disabilities do in fact involve subjective problems. Pain, for example, is simply experienced differently by different people. If subjective factors were unimportant, there would be no need for personal contact at the initial or ALJ level, and yet the proposal implicitly acknowledges, by providing for personal conferences and hearings, that the individual's description of his or her problems is important. If the personal conference and hearing are SSA's means of addressing subjective factors, then the proposal must provide a means for measuring both subjective and objective factors.

Additionally, the elimination of vocational factors and the grid seems to be an attempt to establish a single objective standard within which all claimants can be placed. Our past experience with the grid clearly demonstrates that such attempts, however well intended, fail because disability adjudication cannot be a system of cookie-cutter justice: claimants are individuals who more often than not fall without the standard rather than within. Vocational testimony will have to remain an integral part of the hearing process if justice is to be tailored to the claimant rather than to the program.

5. **Impact of outreach program.** We endorse the agency's effort to assure that all potential claimants are educated on their right to file for benefits. At the same time, while outreach programs must take place, we are concerned about the impact of such a program on the agency's resources. This impact should be fully understood as we undertake education of the public.

In the late 1980's, the agency instituted a laudable program to advertise SSI benefits, children's benefits and the like through posters, television ads and a toll-free 800 number. An explosion of claims followed for which the agency was perhaps unprepared. We have seen a 40% rise in applications since 1989, which in large part accounts for our current backlog. In other words, an outreach program must be understood to have serious potential consequences for both personnel and budget.

6. **Getting from here to there.** We also note that there is currently a large body of law addressing important issues that affect disability. This body of law includes, in addition to the statutes and regulations, circuit law. The decision makers are bound by these rulings in the absence of official change in some fashion. The issues that will need to be addressed include the treating physician rule, the assessment of pain, drug and alcohol abuse, the ALJ's responsibility for development, and the like. We take no position on those matters, but merely alert this committee that the need will arise to determine policy on them.

IV. Conclusion

We reaffirm our congratulations for a job well done. We recognize that this proposal is the first step in the reform process, and we offer the foregoing recommendations in a spirit of cooperation as full partners in reform. We look forward to working with this committee and the agency in the future to provide our disability customers not just good service, but "world class service."

Respectfully submitted,

David L. Jeannot
Association of Administrative Law Judges, Inc. *[Signature]*

Chairman JACOBS [presiding]. Thank you, Judge Tennant.

Mr. Pickle.

Mr. PICKLE. Thank you, Mr. Chairman.

Ms. Ford, if I understood you earlier, you had made the statement that the change in the determination methodology would, in effect, constitute a change in the definition of disability. Did I understand you correctly?

Ms. FORD. Yes, we think that would be the effect.

Mr. PICKLE. Would you go further and tell me why is that a change in actual definition with respect to characteristics?

Ms. FORD. Well, the definition in the statute is very brief, and the implementation of that definition takes volumes (in terms of pages) of the regulations, and it is in changing the way disability is assessed and what is looked at, that you will in effect have a very serious change in the definition of disability.

We are not suggesting that it is not time to change the definition of disability. In fact, many of the CCD task force organizations have in fact called for a look at the definition and whether it is any longer appropriate. But we do not feel that this approach is correct, and we do not feel that this is the correct process for redefining disability. Reengineering is supposed to be an attempt to streamline the administrative process, and we think that the definition of disability is simply too important to get wrapped up into this process.

Mr. PICKLE. As I understand it, Mr. Diller is raising the same question. I think we need to know a little bit more about, if it does change the definition, is it primarily affecting the number of people who might be considered for disability. Is that the basic approach?

Mr. DILLER. No. It is hard to say, because the proposal does not have the specifics. But in just looking at it, it is pretty clear to me that there would be some people found disabled today who would not be found disabled, and possibly vice versa. But there is no doubt in my mind that it would change who is found disabled and who is found not disabled, and I question whether that is appropriate to do in the context of administrative streamlining.

I think that the package of coverage that people get as part of basic disability insurance is too important to slip through a change that would leave people covered one day and not covered the next day.

Mr. PICKLE. Well, I take you are saying yes, in fact, it does change the definition, but there is not a serious problem and just a matter of how you handle it.

Ms. FORD. Well, we do think it is a serious problem, the way it has been described in this report.

Mr. PICKLE. Let me go one step further. Mr. Tennant, you raise a question of the position of the adjudication officer.

Judge TENNANT. Yes, sir.

Mr. PICKLE. I asked one of the Social Security people earlier would this mean that, at the appeals level, would you have to get the approval or the concurrence of the ALJ at that level. About all I got from Social Security was we would be coordinating with them, but it did not say at what level and what manner.

Now, if I get your testimony, you said this would largely be handled if you had an attorney in that position, instead of just some

other officer. Do you think that the ALJs must give concurrence to what the adjudication officer determines?

Judge TENNANT. We think it would be the better proposal. We feel, as I mentioned, at that stage of the process the claimant is asking for really an independent decision. The adjudication officer is not an independent person deciding this case. The adjudication officer is a Social Security employee.

We would hope, as I mentioned earlier, that he or she would be an attorney with legal skills. But we feel that since it is at the hearing level, and since the claimant did request a hearing before an administrative law judge, that the administrative law judge should supervise basically that adjudicative officer's work and make any final decision.

Mr. PICKLE. In what way would you supervise the AO's work?

Judge TENNANT. Make sure that it is correct, Mr. Pickle.

Mr. PICKLE. In other words, you would have to concur in it?

Judge TENNANT. Yes, concur in it.

Mr. PICKLE. I think it is a problem administratively and you have got to determine how you are going to work this thing out. Overall, you are saying that these changes are good, but you have some reservations on them. I can understand that.

Judge TENNANT. And it is very vague.

Mr. PICKLE. The ALJs are key to this, because you have got the problem. You cannot handle the problem like it is today, because we have got 1 million cases backed up, so we have got to streamline or get a new process. I guess we do have some kinks to work out. I would hope that you make your position clear on this, so we could have a better understanding, because these recommendations should be adopted, probably will be adopted, and I hope we have a close liaison with Social Security.

Thank you, Mr. Chairman.

Chairman JACOBS. Thank you, Mr. Pickle.

Mr. Houghton.

Mr. HOUGHTON. Thank you, Mr. Chairman.

I would just like to piggyback on what Mr. Pickle has said. If I understand correctly, to try to simplify this, that something has got to be done. You appreciate the fact that there are various task forces working on this, that you do not necessarily think that maybe the standards are right or maybe the managing process is correct, or maybe the humanity is there, but it is moving generally in the right direction.

Would it not be true that if each one of you had a different set of specific suggestions of how the structure should be, that they could be second-guessed by anybody? At least we are moving, and it depends on people and it depends upon a will to get to the basic issues. Do you not think as you go along step-by-step, month-by-month, year-by-year through these pilot programs into the different managerial processes, that these things will correct themselves?

Ms. FORD. I do not feel that is correct in terms of the definition of disability. I think in terms of looking at frontline managers handling claims and making decisions, gathering evidence and that sort of thing, yes, if there are kinks in the system, they can be worked out. But if we approach it at the same time changing the fundamental nature of what is considered to be a disabling impair-

ment, I think that we affect people's lives in a way that cannot be fixed. It is too serious of an issue to expect time to take care of it. We have to do it very carefully from the beginning.

Mr. HOUGHTON. How do the rest of you feel about that?

Judge TENNANT. Time I believe will take care of a number of these problems. Hearings like today help flesh out some of the areas where we have problems with this kind of barebones proposal. I think that the comment period, when the team decided to have a 60-day comment period on the proposal, I feel that was a great idea, because that gives a chance for everyone not only who is testifying here today, but everyone who is not here today, to give comments on it, and I think that a lot of the problems might be fleshed out, if the Social Security Administration read those comments thoroughly and attempted to accommodate some of the groups giving them.

Mr. HOUGHTON. But you do not really think that they are trying to produce a cookie cutter approach, as you have mentioned?

Judge TENNANT. I believe that they are trying to streamline the process greatly, and I think that it has to be streamlined. There is no defense for a process that takes 2 or 3 years to reach a final decision of disability. But I just want to make sure that when the process is streamlined, that we do not lose sight of the fact that these are individuals here and they deserve individual justice.

Mr. DILLER. I guess I also have concerns, in streamlining the process, that quality and accuracy be upheld, so that—

Mr. HOUGHTON. But do you have any indication that they will not be upheld?

Mr. DILLER. Well, I have concerns about the revisions in the methodology, that they would leave some people in the not disabled pile who today would be in the disabled pile, without any clear justification for the change in outcome.

Mr. HOUGHTON. Certainly that was not the original intent in reorganization, was it?

Mr. DILLER. No, and part of my concern is that the proposal seems to have gone beyond the original intent. I participated in a regional meeting in New York where SSA solicited input from the public. It was an extremely helpful and valuable meeting, and I think everyone who was there was very glad to be able to help. In fact, it was almost a unique occurrence, that the agency was reaching out to the public to ask for help in solving these problems.

But none of us had any idea that the basic decisionmaking methodology—meaning who is disabled and who is not disabled—was on the table at those discussions. So there was no discussion and airing of views on those issues. Instead, we focused, I think appropriately, on the decisionmaking process, which is a nightmare at this point. That is really where the big problems are.

I think the proposals in here are a good starting point for getting at those problems. Some of the ideas in here are not new. Some of them have been around for a while, like the idea of a face-to-face interview before a claim is denied. The GAO studied that issue 5, 6, 7 years ago, and came out with a very positive finding on it. I am really glad to see that there is finally some movement and action on these ideas, as well as new ideas. But what concerns me

is the whole part on the decisionmaking methodology that seems to be slipped in.

Mr. HOUGHTON. Just one other question. Do you know the people who are going to be driving this process? Do you know them? Do you know the people who are going to be managing and leading this?

Mr. DILLER. Do I know them personally?

Mr. HOUGHTON. Yes.

Mr. DILLER. No, I do not.

Mr. HOUGHTON. They may be fully capable of doing what you would like to have them do.

Mr. DILLER. I hope that would be the case.

Mr. HOUGHTON. Thank you, Mr. Chairman.

Chairman JACOBS. We thank the panel for its contribution. You have helped a lot.

Mr. DILLER. Thank you.

Chairman JACOBS. Would the panel please come forward: Community Legal Services, Inc., of Philadelphia, Thomas Sutton; National Association of Disability Examiners, Robert Burgess; National Council of Social Security Management Associations, Mary Chatel; and the National Committee to Preserve Social Security and Medicare, Martha A. McSteen, president.

Would you proceed in the order in which you were called.

STATEMENT OF THOMAS D. SUTTON, SUPERVISING ATTORNEY, COMMUNITY LEGAL SERVICES, INC., PHILADELPHIA, PA.

Mr. SUTTON. Thank you, Mr. Chairman.

My name is Thomas Sutton. I am an attorney with Community Legal Services, in Philadelphia. I have represented hundreds of individual claimants before Social Security and hundreds of thousands in class actions, in particular the Zebley case, which totally changed the childhood disability standard just a few years ago.

I want to associate myself with many, if not all, of the comments of the immediately proceeding panel about this. The process reengineering proposal is in broad strokes a good blueprint for change, has many good ideas, some of them new, some of them not so new, many of them things that we in the advocacy community have long pushed the agency to adopt. And we think that the process has to be streamlined.

As Representative Brewster said this morning, claimants die waiting for these decisions, and there is no justice when that happens. So the process has got to be reformed.

The difficulty is that seemingly slipped into the middle of this proposal to reform the process is quite a radical change in the standard of disability. It is presented under the heading disability decision methodology, but let us make no mistake, this is the standard by which we decide someone is or is not disabled under the law.

I would say, with Judge Tennant, who is a judge hearing these cases, that in fact it appears from this proposal that the statutory requirement that the age, education and work experience of each individual claimant be considered has been read out of this proposal.

What we are basically told are two striking things about the standard that we will have if this proposal comes to pass. First, we will take the list of impairments, which has been refined and improved over the last 40 years, and basically lop off a whole lot of them, leaving a new pared-down index which will contain fewer impairments and fewer details, and will be accessible to laypeople, which certainly has an appeal on the surface.

But when you think about it, you will inevitably have claimants who today are found disabled on the basis of a listing, which is the quickest and easiest way to screen in the absolutely most disabled claimants coming before the agency. And those people who are not fortunate enough to have their impairments make it onto this new slimmed down index will not be allowed benefits at that step of the evaluation. They will be pushed on to the next step of the analysis, which is a real problem, when you step back and consider that the DDSs, the state agencies that do the frontline decisions today pay 39 or 40 percent historically of applicants. Of those 40 percent that they allow, the basis for the allowance in 75 and up to 90 percent of cases is the listing. What we are seeing in this proposal is that we are going to lose the very basis on which favorable decisions are made in the vast majority of cases at the front end, and we are going to push them farther into the evaluation process. That seems to be a real problem for us.

Perhaps even more of a problem, though, is what all of the panelists were talking about previously, and that is that in proposing to scrap the medical vocational guidelines or grids, the team seems to propose to read those vocational factors (age, education and work experience) out of the statute. Each claimant is different.

There is also a requirement in the law that substantial gainful activity exist in significant numbers of jobs in the national economy. What the grids have been for over 15 years are a set of rules that say, for claimants of varying ages and backgrounds, these are the kinds of effects of medical problems which render them dysfunctional at various levels. Under the grids, you do not treat a 25-year-old and a 55-year-old alike in the disability determination process.

Unfortunately, what the team appears to propose is to stop doing that and simply to treat virtually everyone, with one minor exception, the same way. The proposal is pretty vague when it suggests that there is a baseline of substantial gainful activity that everyone should be able to do, and if claimants fall below that, they are disabled, and if they are able to do that, they are not.

It raises alarms in my mind, because I know claimants like the one I have described in my written testimony, a woman in her early fifties with severe heart disease and multiple medical problems that basically restricted her to the point where she could do no more than sit in a chair, who was properly found disabled after several appeals by a judge, upon the basis that sedentary activity is the most she could do. This woman could easily be found not disabled under what the team appears to be proposing here, if the agency decides that the baseline of substantial gainful activity is unskilled sedentary work.

This woman realistically at her age could not sustain competitive employment in the economy, and a proposal that would deny her disability benefits needs to be seriously reexamined. So we think that the process part of this is in large measure good, but that the standard (the "methodology" proposal) needs to go back to the drawing board.

Thank you.

[The prepared statement follows:]

STATEMENT OF THOMAS D. SUTTON, ESQ.
SUPERVISING ATTORNEY
COMMUNITY LEGAL SERVICES, INC.

Mr. Chairman, I am Thomas Sutton from Community Legal Services of Philadelphia, where I am a Supervising Attorney. I have been a legal services attorney for ten years, and have represented hundreds of people in disability claims before the Social Security Administration. In addition, I have served as lead or co-counsel to the plaintiffs in a number of class actions, most notably the Zebley childhood disability nationwide class action decided by the U.S. Supreme Court in 1990. On behalf of my low income clients, I thank you for the opportunity to testify before the Subcommittee.

Like the Commissioner, we are persuaded that the process of deciding disability claims is "broken." Our clients face seemingly interminable delays in obtaining decisions on their claims, all the while teetering on the brink of despair, insolvency and homelessness. Waste, inefficiency and redundancy abound in the current decisionmaking process, and the Reengineering Team is to be commended for many of its proposals to reform that process. A streamlined process would benefit claimants and reduce administrative costs, and the Team has made a positive contribution to achieving that goal.

Unfortunately, the Team has strayed from its laudable mission to reform the process in one section of its proposal. Under the rubric of "Disability Decision Methodology," the Team proposes to scrap the substantive disability standard which has existed in the regulations and caselaw for decades. This aspect of the Team's proposal is objectionable for several reasons. First, the thoroughgoing reform of the process proposed by the Team simply does not require an alteration in the

substantive standard which will be applied at the point of decision in each claim. Second, to the extent that it can be determined from the somewhat unclear proposal, the Team's suggested replacement for the existing disability standard would appear to mandate denials of large numbers of deserving claimants who would properly receive disability benefits under current law. Third, because the controversy sure to be generated by this part of the proposal would take years to resolve, and because of the sheer technical challenge of completely rewriting the regulations which implement the disability standard, the salutary process reforms could be seriously delayed or even derailed by their association with the proposal to significantly change the disability standard. Because this aspect of the Team's proposal is inappropriate and unnecessary, it will be the primary focus of my testimony.

To fully grasp the implications of the Team's proposal, is it essential to review the current disability standard. Congress has statutorily defined disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which will last at least twelve months or result in death. 42 U.S.C. §423(d)(1)(A). The statute further provides that a claimant's impairment(s) must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy," with the latter phrase defined as "work which exists in significant numbers...." §423(d)(2)(A)(emphasis added). Children whose impairments are of "comparable severity" to those which disable adults and whose income and resources

are low enough qualify for SSI childhood disability benefits. Sullivan v. Zebley, 110 S.Ct. 885 (1990).

Over the last several decades, SSA has written and refined regulations to implement the statutory standard of disability. For an adult claimant who is not working and has significant medical impairments, there are two crucial issues under the existing regulations. First, if the claimant has medical conditions so serious as to prevent work no matter how young, educated or skilled the individual may be, she will be found to meet (or equal, if the regulations do not address her conditions) the Listing of Impairments. The agency has had adult Listings for four decades, but they have been subject to major improvements, revisions and additions over time; for example, within the past year SSA has published complete revisions to the Listings for Cardiovascular and Respiratory Disorders, and an entirely new Listing for Immune System Disorders (including HIV and AIDS). The childhood Listings were first published in 1977, and have also undergone significant revisions since 1990. Both adult and childhood Listings are purposely set at a higher level of medical severity than that required to prove disability under the statute; this gives SSA a method of quickly and efficiently screening in the most severely disabled claimants.

For adult claimants whose conditions are not at the extremely high level of severity represented by the Listings, but who are nevertheless unable to return to any relevant work they have done in the past, current regulations analyze whether they are able to perform other work in the national economy through a set of Medical-Vocational Guidelines, or "Grids." The Grids, which were published as formal

regulations in 1978 and informally used by the agency for many years earlier, are a series of matrices which incorporate four factors: age, education, work experience, and physical residual functional capacity. The Grids take administrative notice of the existence of jobs in the national economy at various levels of physical capacity which may or may not be within the ability of a claimant to perform, given the adverse effects of advancing age, poor education or illiteracy, and diminished or nonexistent work skills. For claimants with solely exertional (physical) impairments, the Grids are dispositive of the disability decision; for those with nonexertional and/or mental impairments in addition to exertional limitations, they provide an analytical framework but are subject to rebuttal. The validity of the Grids was upheld by the Supreme Court over ten years ago. Heckler v. Campbell, 461 U.S. 458 (1983).

For child claimants whose impairments do not meet or equal the Listings, there was no analogous functional assessment at all until the Supreme Court ruled in 1990 that the failure to provide one unlawfully disregarded the "comparable severity" standard in the statute. Subsequent to the Zbley decision, SSA has spent several years developing new regulations (completely finalized only seven months ago) which provide for an Individualized Functional Assessment of children in all relevant areas of development and functioning, and which result in findings of disability only where the child's impairments substantially reduce his ability to function "independently, appropriately and effectively in an age-appropriate manner." 20 C.F.R. §416.924(a).

Against this backdrop, the Process Reengineering Team's proposal on

"Disability Decision Methodology" can be seen for what it is: an apparent effort to redefine what it means to be disabled by ratcheting up the standard claimants must meet to qualify for benefits. Although SSA denies any such intention, and although the Team was instructed at the outset that its proposals "should not cause changes in benefit outlays unless as a necessary result of improvements in service" (SSA Pub. No. 01-002, p. 87), adoption of the Team's "Methodology" proposal would appear to result in denials of benefits to individuals who are found disabled under current regulations. This fact is illustrated by two crucial aspects of the proposal as to adult claimants.

ABOLITION OF THE LISTING OF IMPAIRMENTS

First, the Team proposes to abolish the current Listing of Impairments for adults and children, and to replace it with something called an "Index of Disabling Impairments." We are told that this Index "will contain fewer impairments and have less detail and complexity" than the current Listing, and that it will be "as nontechnical as possible" and "simple enough so that laypersons will be able to understand" it. While this proposal has a superficial appeal, a closer examination reveals that it would help neither claimants nor those who process claims. It is clear that an Index containing fewer impairments would result in favorable decisions for fewer claimants; those whose impairments are contained in the current Listings would not be allowed benefits at this evaluation step if their impairments did not make it into the new, pared-down "Index." Moreover, the Team proposes to prohibit any consideration of a claimant's actual functioning at this step, and to abolish the

concept of "equivalence" to the Listing which has long been used to allow benefits to severely disabled claimants with unlisted impairments.¹ Under the proposal, a substantial number of claimants who are allowed at this step under the Listings would no longer receive favorable decisions; rather, their claims would be pushed on to the next evaluation step. Leaving aside the ominous implications for the claimants involved (see below), this would have the ironic effect of increasing the time required to process claims in general. Numerous claims which are now allowed quickly based primarily on medical records would instead be subjected to the more time-consuming process required to obtain the medical and non-medical assessments necessary to evaluate the claimant's functioning at the last evaluation step. Thus, a proposal which has been presented as a simplification would, in practice, needlessly complicate and bureaucratize the process.

ABOLITION OF THE MEDICAL-VOCATIONAL GUIDELINES (GRIDS)

Second, for all those claimants whose impairments are not at the extremely high level of severity established by the Listings, as well as for those claimants whose currently listed impairments would no longer be contained in the regulations, the Team proposes a new last step of the evaluation: "Ability to Engage in Any Substantial Gainful Activity" (or, for children, "Comparable Severity to Adult Ability

¹ Indeed, the Team would also abolish the recently developed concept of "functional equivalence" for children, which has proved to be an efficient way of making favorable SSI determinations for children even more severely impaired functionally than is required by the statute, but whose medical conditions do not appear in the Listing of Impairments. Such children would certainly not receive favorable decisions under an "Index" which contained even fewer impairments than the current Listing.

to Engage in Substantial Gainful Activity"). For adults, the Team proposes to abolish the Grids in their entirety. Whereas the Grids reflect the effects of a claimant's advancing age on his ability to work through age categories of 18-44, 45-49, 50-54, 55-59, and 60-64, the Team's proposal would ignore such differences for most claimants. The proposal would establish only two age categories: "nearing full retirement," and everyone else.² The only apparent difference in treatment is that claimants in the older category who cannot perform their previous work would be found disabled. With respect to claimants "nearing full retirement" age who have not worked in the recent past, and all claimants younger than that category, SSA would deny disability benefits to anyone who can perform a "baseline of occupational demands needed to perform substantial gainful activity. In the current process, an example of comparable 'baseline' criteria are the functional requirements of unskilled, sedentary work" (p. 42, emphasis added). In this sentence, the implications of an otherwise amorphous proposal become quite clear: with one exception, the Team suggests that anyone, no matter how old, unskilled or poorly educated, should be denied disability benefits if they are able to perform only the limited number of jobs considered the least demanding of all--unskilled sedentary work. In this regard, the Team's proposal would appear to abrogate the statute's command that the vocational impact

² The Team does not inform us what ages are covered by "nearing full retirement," but does allow that it should "gradually increase over time" in relation to the full retirement age (p. 43). Existing regulations define ages 60-64 as "closely approaching retirement age." 20 C.F.R. §§404.1563(d), 416.963(d); Part 404, Subpt. P, App. 2, §203.00(c).

of age, education and work experience be considered.³

It is difficult to overstate the extent to which such a standard would depart from current law. Under the Grids, claimants between the ages of 50 and 54 with limited education, no transferable work skills and physical impairments limiting them to no more than sedentary work are found disabled. 20 C.F.R. Part 404, Subpt. P, App. 2, §§201.09, 201.10, 201.12, 201.14. Similarly, claimants over the age of 55 with limited education, no transferable work skills and physical impairments limiting them to no more than light work are found disabled. 20 C.F.R. Part 404, Subpt. P, App. 2, §§202.00(c), 202.01, 202.02, 202.04, 202.06. It appears that the Team's proposal would change the decision to "not disabled" for virtually all of these claimants (with the minor exception of those claimants nearing full retirement age who are unable to return to their previous work, almost all of whom are allowed benefits under current law). It appears from the Team's report that there is no empirical data to support such radical change, which would contradict settled rules of adjudication which SSA has been using for years.

An example from my case files will serve to illustrate the magnitude of this change from the claimant's perspective. In 1989 I represented Mrs. B., a woman in her early 50s with a limited education and work history as a nurse's aide and dietary aide in a hospital. Mrs. B. suffered from diabetic peripheral neuropathy, which

³ As this Subcommittee stated some 34 years ago with respect to the nonmedical aspects of the disability insurance program, "theoretical capacity in a severely impaired individual can be somewhat meaningless if it cannot be translated into an ability to compete in the open labor market." 43 Fed. Reg. 55350 (quoting Subcommittee report dated March 11, 1960).

caused recurrent numbness in her legs, feet, fingers and hands; arthritis in her lower back and right knee, confirmed by x-rays and requiring her to use a cane and a knee brace in order to walk; a history of tuberculosis with shortness of breath several times a day; massive obesity; and ischemic heart disease confirmed by a treadmill test. The Administrative Law Judge who heard Mrs. B.'s case at the end of a two-year appeals process properly found that her conditions did not meet or equal the Listing of Impairments, that she had the residual functional capacity to perform only sedentary work, and that she was thus disabled under Rule 201.12 of the Grids. This rule appropriately recognizes that claimants of this age, with limited skills and education and medical problems which severely limit their functioning, are effectively unemployable in the competitive labor market. Under the Team's approach, however, Mrs. B.'s ability to perform sit for six hours a day would apparently be enough to deny her disability benefits. I would ask the members of this Subcommittee to consider whether a proposal which would effectively deny benefits to Mrs. B. and hundreds of thousands of claimants like her represents sound social policy.

ABOLITION OF THE CHILDHOOD DISABILITY REGULATIONS

With respect to children, the effect of the Team's proposal is somewhat less clear. However, it suggests that the current approach to childhood disability, which has been developed by SSA after considerable time and effort over the past four years, "may not appropriately define how much functional loss or interference with growth and maturity is comparable to inability to perform any substantial gainful

activity" (p. 48). Thus, the Team proposes to scrap the newly promulgated regulations and start from scratch to develop "baseline criteria" comparable to those developed for adults. Given the evident direction of the changes contemplated in the adult standard, we can only assume that the outcome of such an effort would be a standard of childhood disability more strict than current law provides. In any event, it is hard to imagine a more wasteful exercise than one in which an agency which has only just completed a process of convening outside experts in pediatrics and related fields, drafting and publishing interim final regulations, considering public comments, monitoring implementation, and publishing final regulations, would now be expected to turn one hundred eighty degrees to commence the same process once again in the service of the "reengineering" concept.

In summary, the Team's proposal to radically alter the substantive standard of disability has no place in an otherwise thorough and forward-thinking proposal to restructure the process of disability determination. It is our understanding that this Committee on Ways and Means has commissioned a full study of disability policy and standards by the National Academy of Social Insurance, and that the study is currently in progress. We respectfully suggest that the "Disability Decision Methodology" portion of the Team's report be sent "back to the drawing board" and decoupled from the process reforms which are its appropriate focus. My poor and disabled clients would not be pleased to see the important suggestions for process reform delayed and bogged down by their association with highly controversial and potentially damaging changes in the disability standard which, if pressed by SSA,

will inevitably lead to a protracted struggle through the rulemaking and litigation processes. In short, my clients would not be well served by implementation of a plan which promises to deliver decisions more quickly if those decisions will inevitably be negative.

Disabled Americans want real reform of a process which makes them wait too long for the benefits they need in order to survive. I urge the Subcommittee to proceed carefully and deliberately in this area to ensure that hundreds of thousands of disabled people are not hurt in the pursuit of "reform" and "reengineering." Thank you for the opportunity to testify today.

Mr. PICKLE [presiding]. I assume you will make your views known to the Commission, too.

We will now hear from Mr. Burgess, who is president of the National Association of Disability Examiners.

Mr. Burgess.

STATEMENT OF ROBERT BURGESS, PRESIDENT, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

Mr. BURGESS. Thank you, Mr. Chairman.

NADE appreciates the opportunity to comment on the proposed redesign for disability. We think it contains many suggestions that will substantially reduce processing time, and we think that is good. We do have some strong reservations about some key factors.

First of all, with regard to the disability case manager, it takes about 2 years to become a journeyman disability examiner. Unless of course you deemphasize the medical evidence; if you deemphasize the medical evidence, it will not take that long to become a good disability examiner.

The field office claims representatives generally specialize in title II and title XVI portions of their work, because it is recognized that those policies are pretty broad, comprehensive, and very difficult to learn. That is why they specialize. So the disability claims manager is really going to have a lot to learn, and they are also going to have to learn all those systems. I just throw that out. It is going to be difficult for one person to master all of that very well.

The predenial interview that the disability claims manager will have to conduct is going to add a lot of labor intensity to the office. We understand that. The interesting thing that most people in the field are concerned about is the claimant is going to know that this claims manager at least has in mind to deny the case up until this interview. This creates the climate for a rather unpleasant interview and perhaps even some violence.

Administrative law judges and hearing officers do not really conduct hearings under those circumstances. We conduct hearings based on the fact that we are neutral, we come to this thing with an open mind and we are impartial. The perception could be, if this person leaves with a denial, that he has not got an impartial hearing from someone who has already made up his mind to deny.

Although NADE agrees with the proposal for a centralized review of an equal percentage of allowances and denial, and although we certainly agree with the latitude given to the initial decisionmaker, we believe that the whole system is going to be driven by administrative law judge reversals. Consider yourself as a disability claims manager. You have done the best job you can do to assess the evidence, you have conducted a predenial interview which may be unpleasant or it may not be, and about 2 months later a number of reversals begin to come back.

What is going to happen is the disability claims manager is going to start allowing a whole lot of claims, not based upon whether they are supportable, but based on whether he thinks the ALJs are going to send them back. That is going to be the reality of the situation.

Why do we think that ALJs will be sending a lot of reversals back? It is proposed that this system is going to ensure that the

disability case manager has a better atmosphere in which to make decisions, they are more supportable, more allowance prone and, therefore, less cases will go to ALJs.

In fiscal year 1992, DDS hearing officers reversed 55 percent of initial cessation decisions. That was not a rubberstamp. We had face-to-face, we had full latitude, we did not go by the POMs, none of the stuff that seems to predispose people to think that the DDS decision was wrong up front. Nevertheless, ALJs did reverse 54 percent of those decisions. So we see a lot of those decisions coming back to the disability case manager.

The disability case manager, just to protect himself, is going to start allowing a number of cases, so that he will not have to come back and redo the nondisability portion that he deferred, thinking the case was going to be denied, and this is going to result in a tremendous increase in allowances.

I would predict the initial level of allowances is going to go as high as 60 to 70 percent, which means that there will be an attraction for an explosion of applications in addition to that. So it is one thing for the administrative law judges to reverse 70 percent of 509,000 claims, but it is another thing for disability case managers to begin to allow 60 percent or 70 percent of 3 million claims.

There is a study that is being conducted by the Office of Policy Integrity Review that really needs to be looked at before anything is signed off. That study suggests that DDSs are stringent. We know that. The study also suggests that there is a tremendous number of favorable decisions offered by ALJs that might not be supported. So that needs to be looked at before anything is signed off on.

Finally, whatever the ultimate organizational structure might be, we urge that DDSs be fully integrated into that system. State agencies faithfully serve at the Social Security Administration's direction, and a lot of us are anxious about those jobs.

Thank you.

[The prepared statement follows:]

**STATEMENT OF ROBERT BURGESS, PRESIDENT
NATIONAL ASSOCIATION OF DISABILITY EXAMINERS**

MR. CHAIRMAN AND SUB-COMMITTEE MEMBERS:

On behalf of the National Association of Disability Examiners, we appreciate your hearing today on the subject of restructuring the Social Security Administration's Disability Determination Process. Our members, who work in the state DDS's, are in a unique position and have a particular perspective that will be beneficial in examining and commenting on many of these proposals in the re-engineering report. Rather than attempt to address too many issues in our testimony today, because our allotted time does not permit, we shall address four main issues that are of concern to us. We will communicate more completely with the Social Security Administration about other multiple concerns we have in the re-engineering proposal.

This re-engineering proposal is a good start in modernizing the disability program. There has not been any serious effort undertaken to revise the program since its inception in the mid-1950s. Throughout the past 40 years, the disability program has gradually evolved as legislative changes were mandated, court decisions rendered, and policies and procedures modified or added. This has created a "hodge-podge" of mandates, policies, procedures and priorities which have helped create the crisis the program faces today.

We believe that the SSA will find it impossible to effect many of the changes proposed in this plan in the foreseeable future, certainly not by October, 1994. The need for additional study will require much longer to implement changes. Timeframes have a tendency to always be extended in bureaucratic changes. This plan is intentionally vague, and will have to be more fully defined as it develops.

I. THE ROLE OF THE DISABILITY CLAIM MANAGER

Generally, we endorse the concept, because it appears to provide more discretion and latitude for the initial decision-maker. NADE has repeatedly urged, and has so testified before this subcommittee, that there should be more exercise of professional judgement and discretion by the decision-maker at the initial level. The proposed position of disability claim manager will provide for such exercise of judgement. As the plan is implemented, we want assurance that this position will not evolve into just a case processor.

There is great anxiety within the state agencies concerning the jobs and futures of all DDS staff. This report does not mention the state DDS's by name or inference. What is the role of the DDS's? How or where do they fit in this plan? Is there implied federalization of the employees who work for the DDS's? It seems likely that federalization is the obvious intended result. Our Association has been on record since 1975 as endorsing federalization of the state DDS's and that remains the official position of NADE. There are differences of opinion on this position that are held by personnel in the states and it is not expected that we can ever have 100% agreement on such a major change. Therefore, we urge that every safeguard be undertaken to protect the job rights of all state agency career personnel in the critical areas of pensions, leave credits, salary rates and full credit for past state service. This very important issue was addressed as far back as 1977 when former representative Burke introduced a bill in the 95th Congress including a provision (within the jurisdiction of the Post Office and Civil Service Committee) which provided

for the "grandfathering" of state employees into the federal system and giving them civil service retirement credit. This same protection is imperative now if federalization occurs.

Our members are deeply concerned about the stationing of disability claim managers and supporting staff. Can present office locations be utilized; or will these positions be dispersed to field offices? Relocations will create a critical drain on trained, experienced staff who have much in family and personal choices invested in their present locations. Many of these people will end their careers in the disability program if required to relocate. This issue must be carefully considered as the SSA develops this re-engineering plan.

Secondly, we are concerned that the disability claim manager position is a combination or compression of two positions (i.e., the claim representative position in the SSA field office and the disability examiner position in the state DDS) into one. This may prove impractical, simply because of the extensive knowledge required by one employee. It would be very difficult for any person filling the disability claim manager role to adequately deal with all of the complex issues, both nonmedical and medical, that would be inherent in such a position. Additionally, the number of disability claims that such an individual could handle would be limited to a caseload of not more than forty or fifty cases.

Thirdly, there is concern that the proposed face to face pre-denial discussion with claimants may degenerate into "influence" over the decision-maker through threats or intimidation. Hostile claimants may be allowed more often than those who do not express/demonstrate such behavior. If so, this would negate the historic impartiality of the decision-maker which has been possible because of non-direct contact with the claimant.

II. QUALITY ASSURANCE PROCESS

NADE endorses the concept of a national quality assurance process. In fact, we have stressed repeatedly that the quality review system of the past twenty years has contributed to the disparities and different adjudicative climates between social security regions in the nation. It is not equitable for claimants living in one locality to have their claims decided on different adjudicative interpretations than for claimants living in another region of the country. The proposed plan for a national end-of-line quality review is welcomed, and should improve the consistency and fairness of the disability process for all claimants. We strongly recommend that a similar percentage review be established for both allowance and denial decisions.

III. ADMINISTRATIVE LAW JUDGE HEARINGS PROCESS

We are concerned that this re-engineering plan is reinforcing and strengthening the perception of the administrative law judge as the first "real" decision-maker. In the proposal, the state level reconsideration process is eliminated, but in reality it is simply elevated to the administrative officer level in the ALJ process. Isn't it interesting that the proposed plan compresses the claim representative and the state disability examiner into one position whereas at the ALJ level where there is currently one, i.e. the administrative law judge, the re-engineering plan now proposes two, i.e. the administrative law judge and the adjudicative officer. This appears to "backload" the process at the appeals

level while aspiring to "frontload" the decision-making process at the initial decision-maker level. Regrettably, SSA over the years has adopted the attitude that because an ALJ reverses a reconsideration affirmation of a denial, the initial and reconsideration decisions were not correct. Re-engineering the process as proposed with the disability claim manager position does not change this fundamental flaw and there will still be discrepancies between the initial decision and the ALJ decisions even with the new process.

IV. WHERE ARE THE CDR's?

It is interesting that the re-engineering plan does not even mention continuing disability reviews. However, under the proposal, it is logical to expect that more cases will be put on the rolls without any defined plan for review. Medical improvement will be almost impossible to establish, and apparently will not even be attempted. The Congress should understand that we will not be taking people off the rolls under this system unless they return to work.

CONCLUSION

Mr. Chairman, and sub-committee members, we appreciate the opportunity of appearing before you today and offering comments from our membership. Thank you for the attention you have given to the Social Security Disability Program, and those of us in this program look to you for legislative changes to improve this flawed process. Thank you for inviting us to appear.

Chairman JACOBS [presiding]. Thank you, Mr. Burgess.
Ms. Chatel.

STATEMENT OF MARY CHATEL, PRESIDENT, NATIONAL COUNCIL OF SOCIAL SECURITY MANAGEMENT ASSOCIATIONS, INC.

Ms. CHATEL. Members of the Social Security Management Associations are the managers and supervisors who work in the field offices and teleservice centers throughout this country, and we listen to disability claimants each day. We work with local medical sources, advocacy groups and others in our communities.

Disability reform has long occupied our efforts, since the years of misguided downsizing combined with rapidly rising claims and appeals have led to the present crisis. We are, therefore, in a unique position to comment on the disability proposal at its early concept stage, and thank you for this opportunity.

But it will be during the implementation stage that our real work will begin, and we can be of most value as an organization to raise issues and actually evaluate whether the new process is right for the American people.

At this point, however, we believe that the plan as conceived has serious merit, and if adequately funded and properly implemented, promises to move SSAs disability process from redtape to responsive result-oriented customer service.

If, however, the proposal is implemented without an adequate increase in field office staffing, without system support, and without the extensive training required, we will be in a worse position than we are now today. Successful implementation will require a commitment from the leaders of the agency to deploy the necessary resources to the frontlines to provide this world class service.

We have long endorsed the concept of personal streamlined locally delivered claims handling as described in the proposal. We commend SSA's leadership and the team for their serious and thorough approach to disability reengineering.

Their extensive work has led to a proposal which closely follows NCSSMA recommendations, such as reducing the fragmentation of the disability process by minimizing handoffs and eliminating the reconsideration and appeal council steps; simplifying the complex disability evaluation criteria to a lay level of understanding; giving claimants a single contact point for assistance and meaningful dialog, and encouraging the claimants' participation throughout the process; allowing local managers flexibility to modify the intake process and work with community resources to meet the needs of their clients; and completing most aspects of the disability process in a local office, without the handoffs that create bureaucratic nightmares for everyone. From the claimants' point of view, their local office is where they think the claims should be handled.

In response to the questions posed by this committee about the impact on SSA's service to the public, at this point we can only discuss some positive results we foresee under proper implementation and funding. By reducing handoffs, streamlining decision methodology, simplifying the development of medical evidence and reducing levels of appeals, applicants should receive more timely decisions.

Due process protections and appeal rights remain in full force for applicants, and they have a greater involvement in the process. They would have the opportunity for discussions with the decisionmaker at each step. Quality assurance should provide for an accurate decision as early as possible. Here successful implementation is dependent on the initial and ongoing training described.

Cost of the plan will be contingent on the implementation strategy. Savings can be identified in some of the things I have already mentioned. However, costs are difficult to determine until organizational decisions are made and a transitional strategy is agreed upon. Will it work? Can it be implemented?

We will need the cooperation of the medical, congressional and advocacy communities to make this happen. Again, absolutely essential to success are sufficient numbers of staff, fully trained, and with full technological support. In addition to redeploying employees from staffing components to the field, we also need to fully utilize the expert staffs of the DDS offices as part of the team. In the successful experiment in my own office, I have an outstationed DDS examiner who works closely with the claims representatives to deliver the more tailored service envisioned under this disability proposal.

It is important to recognize that the current backlogs in hearings cases of more than 1 year are not addressed in the proposal. There will be no short-term improvement, unless something is done for that workload. In addition, we believe that solving the disability crisis must include working off the CDR backlog of over 1 million cases.

Overall, however, NCSSMA sees this plan as an excellent framework to reengineer the disability process, and we welcome the opportunity to participate in making disability reform a reality.

Thank you.

[The prepared statement follows:]



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TESTIMONY OF
NATIONAL COUNCIL SOCIAL SECURITY MANAGEMENT
ASSOCIATIONS, INC.

BY
MARY CHATEL, PRESIDENT

BEFORE THE
SOCIAL SECURITY SUBCOMMITTEE
COMMITTEE ON WAYS AND MEANS

REGARDING
DISABILITY PROCESS REDESIGN PROPOSAL OF
THE SSA DISABILITY PROCESS REENGINEERING TEAM

APRIL 14, 1994

The National Council of Social Security Management Associations (NCSSMA) has long endorsed the concept of personal, streamlined, locally-delivered disability claims handling as described in the proposal developed by SSA's disability reengineering team.

Our support of this proposal is based on the assumption that when implemented, the reengineered program will be accompanied by the technological assistance called for within the proposal and that appropriate resources and staff will be committed to the front line activities which it describes. This is the most critical point. If the proposal is implemented without an adequate increase in field office staffing, or without the extensive training required, we will be in a worse position than we now face with our current disability crisis. Successful implementation will require a commitment from the leaders of the Agency to deploy the necessary resources to enable us to provide world class service in the disability program.

Disability reform has occupied NCSSMA efforts over the years since misguided downsizing combined with rapidly rising numbers of disability claims and appeals to create the present disability crisis. We have testified before this Committee detailing the crisis and how it developed, and suggesting ways to improve the situation. We believe that SSA's disability reengineering concept proposal is a very good beginning.

Our members are managers and supervisors in 1300 SSA field offices across the U.S. who know well the type of clientele we are dealing with in disability cases. We are familiar with and knowledgeable about the adequacy of local medical sources in our communities.

While NCSSMA is therefore in a unique position to comment on the disability proposal even today at this early concept stage, we will be more effective in commenting later regarding the implementation plan, once the project moves

to that point. At that time we will be able to say with more certainty whether the new process will be right for the American people. At this point, however, we can say that the plan as conceived has serious merit, and if adequately funded and implemented, promises to move SSA's disability process from red tape to responsive, results-oriented customer service.

NCSSMA commends SSA leadership's and the reengineering team's serious and thorough approach to disability reform, which is apparent in this work. The proposal was well-researched and carefully and professionally evaluated. We urged SSA to ask the public what they wanted. We urged SSA to look at the many innovative things managers were doing in field offices nationwide to try to ease the disability crisis. We asked SSA to talk with all stakeholders, both internal and external, and to listen carefully to what was said. This proposal shows clearly that the reengineering team did all of these things and more. Their extensive research has led to a proposal which closely follows changes NCSSMA has long advocated:

- * NCSSMA pointed to fragmentation of the disability process as one factor creating inefficiencies and delays. The proposal would streamline the process by eliminating the Reconsideration and Appeals Council steps, without putting the claimants at a disadvantage, because they will be partners in the process.
- * NCSSMA continually said that the public is confused by a complex disability process. The plan proposes to simplify proposal evaluation criteria to a lay level of understanding.
- * On a daily basis, NCSSMA hears the public say that they want to be more involved in the disability process. They want to deal with one individual rather than numerous people. They want their claims handled locally all the way through the process. The proposal would give claimants a single contact point (hopefully the local field office) for questions, assistance and meaningful dialogue throughout the process, encouraging and inviting their participation and providing clear and understandable explanations of the decision on their case, both verbally and in writing.
- * NCSSMA has continually stressed the value of the field office being present in the local community. The proposal recognizes that by calling for greater flexibility in providing service to claimants. Local managers could modify the intake process as necessary to best meet the needs of their claimants. Likewise, local managers could work with qualified third parties in determining how best to meet the needs of the claimants with whom they interact.
- * NCSSMA has long advocated empowerment of SSA employees on the front lines. This proposal would allow front line employees and management the authority to tailor service to the individual client and to COMPLETE most aspects of the disability process in the local office without the handoffs that create a bureaucratic nightmare for claimants and employees alike.

We welcome the opportunity to better serve the public with the streamlined disability process concept described in the disability reengineering proposal, but we cannot overemphasize the attendant requirement to place more resources in field offices where this additional work will take place.

We recognize this Committee's strong interest in answers to the specific questions posed for this hearing regarding the impact of the proposal on several key aspects of SSA's service to the public. However, we cannot provide complete, credible responses until the implementation plan is finalized.

SSA has set aside a two-month dialogue period, during which NCSSMA members nationwide have a chance to more fully digest and react to the disability reengineering proposal. We may during that time identify aspects of the concept proposal that we feel should be changed. Then, as we move toward the implementation stages, our real work will begin and we can be of the most value as an organization which can knowledgeably raise issues and propose solutions. We therefore request the opportunity to submit more extensive comments to the Committee in the weeks and months ahead.

At this point we can only discuss the positive results we foresee under proper implementation and funding of the proposal:

- * Dramatic reductions in the length of time that applicants for DI and SSI benefits must wait for eligibility decisions are possible. By reducing the number of handoffs, streamlining the decisional methodology, simplifying the development of medical evidence and reducing the levels of appeal, applicants should receive more timely decisions.
- * The pre-denial interview and the discussions with the Adjudication Officer should give claimants a better understanding of exactly what is going on in their case, what evidence is required, and what they can do to speed up the process.
- * Ability to develop complete medical evidence prior to the hearing and clearly identify issues in dispute should lead to a streamlined hearing process.
- * Due process protections and appeal rights remain in full force for applicants and should be better understood by them due to their greater involvement in the process. They would have the opportunity for discussions, in person if they so desire, with the decision maker at each step.
- * Quality assurance aspects of the proposal should provide for an accurate decision as early as possible in the process. Here, successful implementation of the proposal is directly and strongly tied to initial and on-going training. We applaud the investment in employees and in training efforts which the proposal describes.
- * Using a single mechanism for communicating all policy to all decision makers in the process should also counter the perception that different levels of adjudication use different standards in determining eligibility. It should also help that denials and allowances will be reviewed for all levels of decisionmaking, rather than the current system which favors a review of allowances at the early levels and of denials at the later levels.

Costs of the plan will be contingent on the implementation strategy. Savings can be identified in the streamlining initiatives, the simplified manner of obtaining medical evidence and other efficiency measures contained in the proposal. However, costs are difficult to determine until organizational decisions are made and a transition strategy is agreed upon.

In our testimony before this Committee on October 23, 1993, NCSSMA gave many examples of innovative methods that local field offices were using to try to cope with the disability crisis. In

that same testimony, we outlined a desired scenario which very nearly describes the disability claims manager function as proposed by SSA's disability team. Will it work? Can it be implemented? Again, absolutely essential to success are sufficient numbers of staff, fully trained and with full technological support.

NCSSMA believes that the best chance SSA has for success is to disperse the disability workloads to all of the field offices and provide us with the resources needed to handle them. Present staffing levels in field offices are nowhere near adequate to offer this personalized, quicker service to the public. Redirecting where claims are developed and streamlining the evaluation criteria will only counter balance the extra time it will take to be more responsive to the claimant, such as to conduct a pre-denial interview at each step. Therefore, we will make no progress without a major influx of resources to wherever we perform the proposed disability claims manager function. From the claimant's viewpoint, that location must be at their local field office.

Staffing figures show that only half of SSA's employees are presently located in the field offices and teleservice centers providing direct contact service to the public. If SSA is to achieve successful implementation of this disability proposal, significant redeployment of employees from staffing components to the field must occur. We also need to fully utilize the expert staffs of the DDS offices as part of the team. In my own office, for example, where we have been conducting a successful disability claims processing experiment, an outstationed DDS examiner works closely with the claims representatives to deliver the more tailored type of service envisioned under the disability reengineering proposal.

Another caution that must be addressed are the growing backlogs of disability claims. The current backlog in the Office of Hearings and Appeals of more than one year is not addressed in the proposal. There will be no short term improvement unless something else is done, and the current backlog will compound and delay any expected long term improvement. NCSSMA also believes that any solution to the disability crisis must include working off the Continuing Disability Review backlog of over a million cases, another labor intensive but cost effective workload which is not addressed by this proposal.

In summary, NCSSMA believes that the disability reengineering proposal was well researched and carefully and professionally evaluated. It appears to move SSA's disability process from red tape to results-oriented, responsive customer service. It will be costly, particularly in the short-term, but should save many administrative dollars over time. The long term cost savings can only be realized if money is invested up front. Implementation plans are crucial to success, particularly during the transition. The entire effort will fail without the proper staffing deployment to the field. Congress should not expect instant success. This disability reengineering effort will require a big training investment and a lengthy "learning curve." It does nothing for the current backlog.

Overall, we see this plan as an excellent framework. We look forward to providing a more comprehensive review as the details of its implementation are developed. NCSSMA welcomes the opportunity to participate in making disability reform a reality within SSA.

Chairman JACOBS. Thank you, Ms. Chatel.
Ms. McSteen, former Commissioner of Social Security.

STATEMENT OF MARTHA A. MCSTEEN, PRESIDENT, NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE

Ms. MCSTEEN. Thank you, Mr. Chairman.

We would like to commend the Commissioner for addressing the issue and acknowledge the creativity reflected in the proposed redesign. Our overall impression is positive. We view four elements as being particularly good.

First, the concept of a disability claims manager, an employee who is knowledgeable about the medical and nonmedical factors of entitlement, with responsibility for making that initial decision.

The reality is that the success of this concept demands that a host of issues be addressed. Developing and training claims managers will be a costly and timely process. At best, the concept must be tested and evaluated in various demonstration projects before decisions are made regarding implementation.

Second, eliminating the reconsideration step should cut nearly 2 months from the current processing, and many of us have endorsed this step in the past.

Third, the creation of a position of an adjudication officer who would oversee the prehearing development of an appeal and have the authority to reverse a denial, when dictated by the evidence, will improve the hearings process and also speed some decisions.

And, fourth, the newly defined role for the Appeals Council is encouraging. I perceive it as a quality review.

Notwithstanding our overall favorable response to the report, there are some elements that I would like to comment on. One is the implication that a computer program can virtually make the disability decision. There is no question that the proposed ability of expert consultants to assess a claim for computer review of evidence should improve the timeliness of the decision. However, the task of making the correct decision must involve a highly skilled person, and we trust that this will be a strong factor always.

A similar goal, but naive, in my opinion, is that the Social Security Administration will give primary emphasis to obtaining medical information from treating sources by way of "brief, but specific diagnostic information." Seeking health care providers' assistance in educating the medical community on the clinical application of these instruments is a desirable goal. But obtaining precise data from the doctor on a government form will be a formidable task. Yet, it will be essential in the decisionmaking process.

Another concern is shifting full responsibility for preparation of an appeal and assembly of evidence to the claimant's representative, if a representative is designated. Social Security must never relinquish its responsibility to assist the claimant all the way through the appeals process.

Reengineering disability, according to the proposed blueprint will not happen overnight. Resolution of the current crises in new initial applications and the backlog of continuing disability reviews cannot wait for the redesign of the process. The integrity of the system requires continuing disability reviews be done now. However overwhelming the task, the Social Security Administration must si-

multaneously undertake cutting the backlog and managing reviews, while developing and implementing a restructured process.

Last, I would like to suggest ways to respond to the current disability plight. Mr. Chairman, 2 years ago, you introduced a bill, H.R. 1799, to reform the Social Security appeals process. We were pleased to support that measure. Enactment and implementation of these changes is a logical first step, no matter the ultimate form of the redesign process.

Upgrading the training of claims representatives should begin now, and the agency should be given the financing it needs. Additionally, a concentrated training program for claims representatives offers the agency the ability to develop and test a prototype for the extensive training the new disability claims managers will need. And additional steps must be taken now to speed up the administrative law judge decisions. Those thousands of decisions that have not been put into print need to be processed immediately.

In conclusion, we encourage redesign, recognizing, however, that this will require time, talent and dollars. We encourage demonstration projects along with simultaneous efforts now to improve the process, following the general proposal outlined in H.R. 1799.

Thank you.

[The prepared statement follows:]

**STATEMENT OF MARTHA A. MCSTEEN, PRESIDENT
NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE**

Mr. Chairman and members of the Subcommittee, on behalf of the members and supporters of the National Committee to Preserve Social Security and Medicare, I want to express appreciation for this hearing to assess the impact of the proposal to reengineer the disability determination process. We are continuing to analyze individual elements and will submit our detailed views to the Social Security Administration within the comment period.

I would like to address several aspects of the reengineering plan. In addition, I would like to urge Congress to act immediately to increase the Social Security Administration's efficiency in processing disability applications as you, Mr. Chairman, proposed in H.R. 1799 in 1991.

We would like to commend the Commissioner for addressing the issue and acknowledge the creativity reflected in the proposed redesign. Our overall impression of the proposed new design is positive. The breadth and depth of the thinking that went into the redesign is impressive.

First I want to comment on four of the most positive elements.

One, the concept of a disability claims manager — a front-line employee knowledgeable about the medical and non-medical factors of entitlement with responsibility for making the initial determination and, if favorable, implement payment — is a grand design.

The reality is that the success of this concept demands a host of issues be addressed, most specifically, developing complex computer software and training the claims manager. The claims manager position as envisaged by the reengineering team requires multiple abilities— management skills, social and psychological interviewing skills, technical Social Security expertise and ability to analyze and evaluate the functional limitations imposed by medically determinable impairments. Quite an array of talent. Developing and training claims managers will be a costly and timely process. At best, the concept must be tested and evaluated in various demonstration projects before decisions are made regarding implementation.

Two, eliminating the reconsideration step should eliminate nearly two months from the current processing time. Many of us have endorsed this in the past. The number of initial denials reversed at the reconsideration stage is too small to justify the time spent on this step. If initial claims are better prepared, there will be even less justification.

Three, creation of the position of an adjudication officer who would oversee the pre-hearing development of an appeal and have the authority to reverse a denial when dictated by the evidence will improve the hearing process and also speed some decisions.

Four, the newly defined role for the Appeals Council role is encouraging. I perceive it as a quality review.

Notwithstanding our overall favorable response to the report, we have some concern with certain elements of the redesign proposal.

One is the implication that if medical and vocational data are appropriately entered, a computer program virtually can make the disability decision. We believe well-designed technology can enhance the disability determination process. Delay is inherent in handing-off a paper file and waiting for its review and return. There is no question but that the proposed ability of expert consultants to access a claim for computer review of medical and vocational evidence should definitely improve the timeliness of the decision. However, the task of making the correct decision must involve a highly skilled person.

A similar goal, but naive in my opinion, is that the Social Security Administration will give primary emphasis to obtaining medical information from treating sources by way of "brief, but specific diagnostic information..." Seeking health care providers' assistance in "educating the medical community on the clinical application of these instruments" is a desirable goal. But obtaining precise data from the doctor on a "government form" will be a formidable task yet it will be essential in the decision making process.

Another concern is shifting full responsibility for preparation of an appeal and assembly of evidence to the claimant's representative if a representative is designated. We approve of a claimant becoming more involved in the development of a claim. No one has a greater stake in the outcome. Nevertheless, the claimant's personal involvement or the designation of a representative should not relieve Social Security of its responsibility to assist the claimant through the appeals process. Third party advocates have been extremely helpful to claimants less than fully able to help themselves. But too great a reliance on third parties may not always be in the best interest of the claimant. Social Security should not be in the business of soliciting third parties to assist claimants in putting together an application package. Taking an application and assembling evidence is Social Security's job.

Reengineering disability according to the Social Security Administration's blueprint will not happen overnight. Resolution of the current crisis in new initial applications and the continuing backlog of Continuing Disability Reviews cannot wait for redesign of the process. Disability claimants now waiting for an initial decision are entitled to a timely decision. The integrity of the system requires Continuing Disability Reviews be done now, not after the new process is implemented. However overwhelming the task, the Social Security Administration must simultaneously undertake cutting the backlog and managing reviews while developing and implementing a restructured process.

I would like to suggest ways to respond to the current disability plight.

Mr. Chairman, two years ago you introduced a bill, H.R. 1799, to reform the Social Security appeals process. We were pleased to support that measure which appears to have contributed greatly to the thinking of the reengineering team. Features in common include more complete assembly of medical and vocational evidence when the original application is taken, provision for a face-to-face interview before an initial denial and elimination of the reconsideration step in the appeals process as unnecessary and non-productive. Enactment and implementation of these changes is a logical first step no matter the ultimate form of a redesigned process.

No one can or should be satisfied with the present situation. According to the reengineering team, the present situation requires more than five months to complete 13 hours of work to reach an initial decision on a disability claim. The starting point for faster decisions is in local offices. Complementary revisions can be made in the present process to facilitate current claim decisions and to ease the transition to the new process.

The current disability workload reportedly is so overwhelming that claims representatives lack the time to do the in-depth interview and claims development that could shorten the disability decision process at the State agency. Upgrading the training of claims representatives so as to improve the quality of current applications can begin now if the agency is given the administrative discretion and financing it needs. The bonus is that a concentrated training program for claims representatives offers the agency the

ability to develop and test a prototype for the extensive training the new disability claims managers will need if they are to take on the responsibility of both developing and deciding disability claims.

Additional steps can be taken now to address the administrative law judge decision making process. Reportedly, there are thousands of decisions already made yet not finalized in writing and signed by the administrative law judge. The Social Security Administration should assign priority to these responsibilities.

In conclusion, we encourage redesign, recognizing however that this will require time, talent and dollars. We view the potential of a revised process to produce faster and more accurate decisions as well worth taking the risk to develop; but it will not be quick, it will not be cheap and it will not be easy.

We encourage demonstration projects along with simultaneous efforts now to improve the process following the general proposal in 1991 outlined in H.R. 1799.

Thank you, Mr. Chairman, for the opportunity to comment on an issue so essential to thousands of the disabled who deserve prompt and accurate decisions on their claims.

Chairman JACOBS. Thank you.

The burden of the message I think that the committee will glean from the record is that it is a good idea to be careful how you proceed. One is reminded of the Australian bushman who wanted to get a new boomerang, but had some trouble throwing away his old one. [Laughter.]

That is probably what we are up against. We will persevere.

The subcommittee will recess until 1:15.

[Recess.]

Chairman JACOBS. The appointed hour has arrived, and so will the next panel please come forward, advance and be recognized, as they say, give the password: The National Treasury Employees Union, Jim Hill, president; Frederick B. Arner, Kensington, Md.—and there was not enough space to put his pedigree down here—and Charles Robert, attorney, with the law firm which, as usual, has a lot of names. But yours is the one that counts.

STATEMENT OF JAMES A. HILL, PRESIDENT, CHAPTER 224, NATIONAL TREASURY EMPLOYEES UNION

Mr. HILL. Good afternoon, Mr. Chairman.

My name is James Hill. I am employed by the Office of Hearings and Appeals at the Social Security Administration, as an attorney advisor. I am also the president of chapter 224 of the National Treasury Employees Union, which represents approximately 75 percent of OHA's attorney advisors across the United States.

The Social Security disability determination process is unquestionably broken. This antiquated process created in the mid-1950s simply is not adequate to meet the needs of the 1990s and beyond. Disability determinations are unconscionably slow and notoriously error-prone. The American public is not receiving the quality of service it deserves.

The disability reengineering proposal constitutes a radical solution to the current problem. The disability process reengineering team led by Rhoda Davis is to be commended for its work, vision and courage for promising such a radical and comprehensive redesign of the disability process.

Implementation of reengineering principles can correct many of the problems that currently plague the disability process, but only if the basic integrity of the adjudication process is preserved. That integrity is ultimately based upon the premise that the issue of disability is a legal determination, rather than a medical determination.

Mr. Chairman, there is no medically determinable impairment known as "disability." Nonetheless, many senior Social Security Administration officials have consistently voiced a preference for the medical determination philosophy. Implicit in that philosophy is a diminution of the importance of providing claimants with due process of law. After all, medical determinations, unlike legal processes, have little need or use for concepts such as due process. Unfortunately, the Social Security Administration has historically taken a very narrow view of the due process rights of its claimants, and this attitude continues.

Since disability is a legal issue, the adjudication process must be premised on the traditional values of our legal system, including

due process of law, so that the claimant and, indeed, the American public, is assured that his or her government will conduct a proceeding that is fair. The decisionmakers in the disability determination process must understand and apply the basic principles and concepts of our legal system to guarantee claimants a fair and impartial adjudication.

NTEU recognizes that the current proposal is silent on many areas of vital concern, such as the new regulatory standards for determining disability. Until the matters are finalized, it is impossible to adequately assess whether reengineering the disability process is advisable. Nonetheless, with this caveat, and if the agency finally accepts the premise that disability determination is a legal proceeding and adequately protects the rights of the claimants, NTEU is convinced that reengineering the Social Security disability process will result in vastly improved service to the public, by decreasing processing time, improving the accuracy of decisions at all levels of adjudication, protecting the claimants' due process and appeal rights, and providing a high-level service to claimants who require assistance in developing a claim for benefits.

Thank you.

[The prepared statement follows:]

STATEMENT OF JAMES A. HILL
PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION

My name is James A. Hill. I am employed by the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA) as an Attorney-Advisor. I am also the President of National Treasury Employees Union (NTEU) Chapter 224 which represents approximately 75% of the Attorney-Advisors across the United States. Additionally, I am a member of the Reengineering Disability Executive Steering Committee. I wish to thank the Subcommittee for inviting me to testify regarding reengineering the Social Security disability determination process.

None dispute that the Social Security Disability determination process is broken. The most ominous characteristic of the breakdown in service is the truly alarming growth of the backlog of pending disability applications leading to unconscionable delays in awarding benefits to qualified applicants. Although the numbers of employees of the Social Security Administration decreased from approximately 85,000 in 1983 to approximately 63,000 in 1990, which is consistent with current levels, it cannot be considered a causative factor for the backlog problem which began in 1992. On the other hand, there has been a truly astounding increase in the number of disability applications (both Disability Insurance and Supplemental Security Income) since 1990. The coincidence of the substantial increase in applications with the spectacular increase in the backlog naturally leads to an assumption that the increase in applications is the cause of the problem. The cost of increasing staff, equipment and office space to meet current work levels is prohibitive. In a time of deficit reduction, such massive increases in expenditures are politically unattractive and probably unattainable. Additionally, focusing on the increase in applications as the cause of the disability backlog obscures other substantial and systemic inadequacies of the current disability adjudication system. Correcting these systemic inadequacies may result in substantially improved service without a substantial increase in cost.

The unprecedented increase in applications is not the cause of the disability adjudication crisis, it is merely the precipitating factor. The simple fact is that the current adjudication system itself is the root cause of the current "disability crisis". This should not be surprising since the disability adjudication process has not been significantly altered since the Social Security Disability Insurance program was implemented in the mid 1950's. The current process is predicated on the demographics, business practices, technology and politics of those years. While modern telecommunication systems and data and word processing systems have been installed, they have only been used to augment the pre-existing system - "paving the cow path". The basic structure, adequate for the task in 1956, is obsolete for use in the 1990's and beyond. The fundamental unsoundness of the current system is demonstrated not only by the present backlog but also by the inability of SSA to solve the backlog problem through a plethora of "short-term fixes" during FY 1993-1994. The Agency's inability to incrementally improve the current system leads inexorably to the conclusion that the system itself is fundamentally flawed, and that it must undergo a radical redesign process.

REENGINEERING THE DISABILITY PROCESS

The Social Security Administration recognized that it was not providing the American public with the quality of service it deserves. In addition to treating the current problems with a variety of programs designed to provide "short-term fixes", SSA conducted an extensive and fundamental reexamination of the existing system and is now considering whether to use the reengineering business processes program as its vehicle for moving its disability operations from the 1950's to the 21st Century. The SSA Disability Process Reengineering Team issued its Proposal for utilizing reengineering concepts on March 31, 1994. This Proposal focuses on the disability process itself without concern for the multitude of organizational and human resource matters necessarily involved with implementing the proposal. As such, the proposal deals with concepts rather than specifics. The Proposal introduces many new and in many cases revolutionary concepts (e.g., instruments that provide "A Standardized Measure of Functional Ability") but consistent with its purpose, it supplies little or no guidance regarding the design and content of the new concepts. Given the fact that the Proposal fails to address major structural concerns, to say nothing of "the details", no definitive evaluation of the merits of the Proposal can currently be made.

PROBLEMS AREAS IN THE CURRENT DISABILITY ADJUDICATION PROCESS

In identifying the problems with the current system, it is prudent to ask the agency's "customers" regarding the aspects they dislike the most. The Disability Process Reengineering Team conducted an extensive research program, part of which involved soliciting opinions from focus group participants regarding the current system. These opinions included:

- ◆ They wait too long for a decision.
- ◆ They do not understand the program or process.
- ◆ They want more information and personal contact.
- ◆ They view the initial and reconsideration denials as bureaucratic precursors to final approval at the ALJ level.
- ◆ They believe the process is designed "to make them go away".
- ◆ They want to make their case directly to the decision maker.

Succinctly stated, the current process is unconscionably slow and error prone, confusing, unfriendly, expensive, and too impersonal and remote. Not surprisingly, the concerns of the public are reflected by the concerns of this Subcommittee which involve the inordinate length of time required by the process, the accuracy of decisions at all levels, the level of service provided to the public, and ensuring that the claimant is accorded due process of law. Merely identifying the problems is not a sufficient basis for correcting them. Each problem must be reviewed in some detail in order to reveal not only the flaw but the most expeditious manner to correct it.

THE DISABILITY DETERMINATION PROCESS IS TOO TIME CONSUMING

The unconscionable slowness of the disability adjudication system is legendary. Recent SSA studies reveal that an award at the initial level requires approximating 150 days and involves work by as many as 26 employees in 5 to 6 work sites. An award at the reconsideration level requires a total of 260 days and involves work by as many as 36 employees in 9 to 10 work sites. An award at the ALJ level requires a total of 550 days work by as many as 45 employees through 10 work sites. If the application is denied through the Appeals Council level, 740 days would have passed since initial contact and as many as 43 employees in 14 work sites would have been involved in processing the application. The length of time required to award benefits at each level is approximately the same. This is simply unacceptable.

While the current backlog has resulted in substantially longer adjudication times, even as early as 1988 (well before the backlog became a problem), adjudications through the ALJ level consumed 220 days as compared to the 260 days currently required. Disability determinations have required unconscionably long periods of time for many years now. Much of the slowness cannot be attributed to the increase in applications, although that increase certainly exacerbates the problem.

A determination is made at the conclusion of each step of the process; to proceed to the next step the claimant must notify SSA that he/she wishes to appeal the current determination; in other words the claimant must in essence reapply. The Agency has always relied upon a substantial number of claimants simply giving up hope after being denied and not proceeding to the next level. Additionally, the claimant has a period of 60 days in which to file an appeal which could result in a total of 180 days during which absolutely no action is taken to adjudicate the file. It becomes abundantly clear that the four step administrative process in and of itself imposes substantial impediments to a timely, efficient adjudication system particularly considering the frequency with which such appeals are made.¹

¹Claimants file appeals on 50% of the adverse initial determinations, 75% of the adverse reconsideration determinations, 59% of the adverse ALJ decisions, and 23% of adverse Appeal Council decisions.

THE DISABILITY DETERMINATION PROCESS IS ERROR PRONE

The disability determination process involves interpretation of complex medical, vocational and legal issues. The issue of disability is to some extent subjective and involves the exercise of judgment. Consequently, uniform agreement as to whether each and every individual is disabled will not be achieved. Necessity demands that we accept that competent men and women can disagree on whether a particular individual is in fact disabled. Nonetheless, there should be limits upon the extent and frequency of disagreement which can be tolerated. By all accounts, the current discontinuity between the decisions of the various levels of the adjudicatory process are outside the limits of tolerable error.

DISPOSITION OF CASES AT VARIOUS ADJUDICATORY LEVELS

	Initial Determinations	Reconsideration	ALJ Dispositions	Appeals Council Dispositions	Federal Court Dispositions
Deny	61%	85%	23%	70%	43%
Dismiss			10%		7%
Allow	39%	14%	67%	4%	8%
Remand				26%	42%

Perhaps the most stunning statistics in the above table are those involving the payment rate by ALJs and the rate of remands from the District Court. The Health and Benefits Committee of the National Conference of Administrative Law Judges, American Bar Association in a report dated February 6, 1994 suggested that causes for the high remand rate include the open record approach and lack of finality in the system, inadequate and poorly allocated resources, erosion of the "substantial evidence" rule, inadequate prehearing development, the unreasonable responsibility placed upon the ALJ to "develop" the evidence, and the workload. Except for the final reason, all of these factors involve systemic problems rather than the effects of the backlog. These factors demonstrate that it would be grossly unfair to lay the blame for the high remand rate from the District Courts at the feet of the Administrative Law Judges.

Systemic problems also are at the root of the high rate at which ALJs award benefits to claimants previously denied at the state agency level. While the Table shows an award rate of 67%, when one factors the results of higher level remands, the ALJs award nearly 75% of the cases before them. The aforementioned Report of the Health and Benefits Committee of the National Conference of Administrative Law Judges, American Bar Association commented:

"We are unaware of any other appellate system in the world in which there is such a discrepancy between determinations at the first two decision-making levels, and the level at which an impartial fact finder becomes involved. The reasons for this disparity must be exposed and remedied."²

It is difficult to overlook such spectacular discontinuities. Therefore, it is not surprising that the Disability Process Reengineering Team found that claimants viewed the initial and reconsideration denials as bureaucratic precursors to final approval at the ALJ level. The Team is not alone in that conclusion. The inconsistency between the determinations at the state agency and appeals levels must be explained and corrected. Internal and as yet unpublished studies by SSA's Office of Workforce Analysis which rigorously investigated the degree of error in decisions at all levels has demonstrated that the apparent inconsistencies at the various levels of the process are not illusory. While some of the discrepancies can be attributed to new evidence, this study demonstrated the substantial inconsistency is inherent in the process itself.

²Report of the Health and Benefits Committee, National Conference of Administrative Law Judges, American Bar Association, February 4, 1994.

There are two major reasons for the gross discrepancy in results at different levels of the process. The most glaring source for the discrepancy in the use of entirely separate disability criteria at the first two and final two adjudicatory levels. While the Administrative Law Judges and the Appeals Council apply the Social Security Act, as amended, the regulations, and the case law, DDS adjudicators at the initial and reconsideration levels apply the POMS. Perhaps an even more fundamental reason for the decisional discontinuity is that ultimate decision maker at the lower levels is a physician who views the disability determination as a medical assessment, while the appeals decision is made by an Administrative Law Judge is a lawyer who views the disability determination as a legal matter involving both medical and non-medical factors. Additionally, it must be noted that the Administrative Law Judge is the only decision maker in the entire process that has face-to-face contact with the claimant. In matters such as resolving the credibility of the claimant such contact is an essential element. The aforementioned unpublished study by the Office of Workforce Analysis conclusively demonstrated that face-to-face contact has a measurable effect on the decision making process.

The second major factor in decisional discontinuity arises from the quality assurance policies of the Agency. A sample of decisions made at the initial two levels is reviewed by the Disability Quality Branch. However, the sample is far from random; 95% of the claims in which decisions favorable to the claimant are reviewed while only 5% of the claims in which decisions unfavorable to the claimant are reviewed. Such systemic pressures cannot facilitate impartial adjudications and in fact result in an increased denial rate. While there is no effective quality assurance for ALJ decisions, claimants seldom appeal favorable decisions which leads to only unfavorable decisions being reviewed by the Appeals Council. This combined with the relative ease of issuing a favorable rather than an unfavorable decision for the overworked ALJs and staff at OHA and the pressure to issue as many decisions as quickly as possible, inevitably leads to an increase in the rate of favorable decisions.

THE DISABILITY DETERMINATION PROCESS IS TOO EXPENSIVE

"The total costs for processing initial disability and appeals determinations (excluding the costs for processing the *Sullivan v. Zebley* court case) remain enormous - more than half of the total administrative costs (including DDS costs) for SSA in FY 1993 were devoted to this task." It is clear that the disability adjudication process is consuming an unwarranted amount of agency resources. In today's world of deficit reduction, the proper allocation of available resources is of great concern.

DUE PROCESS OF LAW AND APPEALS RIGHTS

For a considerable period of time debate has raged within the Social Security Administration regarding whether disability determinations are medical or legal determinations. In the best of bureaucratic tradition, SSA has "resolved" this debate by making a "medical" determination at the state agency level and a "legal" determination at the ALJ and Appeals Council levels. Of course the federal courts, which have the final word in contested disability determinations, view the matter as a "legal" question. Therefore, ALJ decisions, which must be able to withstand the scrutiny of the district court, must be of a "legal character". This simple reality is often ignored by senior SSA officials when they deal with disability adjudication process with predictable adverse consequences.

Implicit in the "medical determination philosophy" is a diminution of the importance of providing the claimants with due process of law. Medical determinations have little need or use for concepts such as due process. SSA has historically taken a very narrow view of the "due process rights" of its claimants. As early as 1959 and 1960 Congressional hearings were conducted pursuant to the interest of Congress in protecting claimants' due process rights. At that time SSA refused to make public the standards by which it determined disability. The Social Security Administration continues to manifest a lack of concern for its claimants' due process rights as demonstrated by its characterizing as "operational realities" beyond its power to effectively reverse such as:

"A system which depends on increasingly disinterested third parties to provide timely and complete documentation before a legally sufficient decision can be made."¹

¹Process Review Report - The Office of Hearings and Appeals, (Social Security Administration, 1991), p.59.

The "disinterested third parties" are treating sources who have the best evidence regarding the claimant's medical condition and Medical and Vocational Experts who testify at the ALJ hearings and whose responsibility is to provide *unbiased* expert testimony. The Federal courts have placed increasing weight on the evidence supplied by these sources. Why would SSA be hostile to evidence supplied by treating sources and to unbiased expert testimony? Obviously, SSA would prefer to depend upon sources it can and does control. The initial and reconsideration determinations are predicated upon the "opinion" of the State Agency Physician, who, unlike the Medical Expert at the ALJ hearing, is not subject to "cross-examination" by the claimant or his/her attorney, thereby eliminating the "historical check" to ensure credibility inherent in our system of jurisprudence for many centuries.

Consistent with its traditional hostility towards due process of law, the Social Security Administration has consistently demonstrated an institutional hostility towards legal practitioners in the disability adjudicatory process regardless of whether those practitioners are claimant's representatives, Attorney Advisors, Administrative Law Judges, or Judges in the Federal court system. The bias against legal practitioners stems from resentment by SSA regarding the effects on the adjudicatory process caused by these practitioners. Private practitioners play a vital role in securing benefits for claimants denied benefits by SSA officials. A large percentage of the legal practitioners employed by SSA (primarily Administrative Law Judges and Attorney Advisors) work in the Office of Hearings and Appeals. They are essential in reversing a substantial number (70-80%) of disability determinations made by the DDS under the tight control of SSA management. The judicial independence of Administrative Law Judges is protected by the Administrative Procedure Act (APA), and consequently, SSA management has little control over the decisions of the Administrative Law Judges.

The Social Security Administration has traditionally resented interference from the federal courts over which it has no control on matters of disability. Particularly troubling is the reluctance of SSA management to recognize the legitimacy let alone the primacy of the courts in the adjudication process. SSA clearly revealed its inclinations regarding these matters in the "Process Review Report" as demonstrated by the following statements:

"An increasingly litigious society and a growing awareness of the potential for financial gain from federal disability cases among attorneys."

"A past period of legally insufficient decisions (or at least so ruled) which saddled the Agency with a number of very troublesome class action lawsuits and a poor reputation in the Federal court system" (emphasis mine)

"In recent years the emphasis in processing requests for appeal of hearing decisions has shifted from one of mainly ensuring correct decisions to one that is now at least equally geared to ensuring that ALJ decisions are sufficiently documented to withstand potential court challenge. The courts are looking not only at the reasoning behind an ALJ's decision, but also at whether the ALJ has considered all appropriate factors and weighed them properly."⁴

To those with legal training, the difference and certainly the significance of the distinction between merely "correct" and "legally defensible when challenged in court" is minimal; if the decision will not withstand district court scrutiny, it simply is not correct. In any event, the courts are not likely to change their standard of review to suit the desires of SSA officials. SSA officials must recognize that the courts, not SSA management officials, have the last word about whether an individual is disabled and adjust the disability determination process to reflect that reality.

THE PROPOSAL ADEQUATELY PROTECTS THE APPEALS RIGHTS OF CLAIMANTS

The current SSA administrative disability determination process consists of four levels, the initial determination, the reconsideration determination, the ALJ hearing level and the Appeals Council level. The Proposal advocates a two level process consisting of an initial claims processing level and

⁴Ibid., pg.59.

an appeals level. Elimination of the reconsideration level which resulted in reversing the initial determination only 14% of the time and adverse results were appealed 75% of the time and reduces processing time imposes no burden upon the claimant. Considering the changes proposed for the initial determination which should result in a more equitable evaluation of the claimants' disability status, a reconsideration level would be even more useless.

The benefit to claimants of eliminating their right to appeal an ALJ decision to the Appeals Council is not as striking. While only 4 % of appeals to the Appeals Council resulted in outright reversals, 26% of the appeals received resulted in remands to the ALJ. Since nearly all claims reviewed by the Appeals Council were adverse to the claimant, the remand rate is significant. Unfortunately, NTEU has no knowledge regarding how many remanded cases eventually result in allowances by ALJ on remand. The Report of the Health and Benefits Committee of the National Conference of Administrative Law Judges, American Bar Association dated February 6, 1994 emphasized the necessity of competent evidence development at both the initial and prehearing levels so that the ALJ has a properly developed record before him/her at the hearing. The Proposal provides that at the prehearing level the Adjudication Officer is charged with the responsibility of ensuring that the record is complete at the time of the administrative hearing. Removing the responsibility for directing prehearing activities and providing the ALJ with a complete record should permit the ALJ to spend far more time and effort on the hearing and the subsequent decision. For a considerable period of time a substantial number of Administrative Law Judges have complained that the excessive caseload and the "pressure" to decide as many cases as possible has resulted in a deterioration of the quality of the ALJ review. The proposed procedure should provide the ALJ with the atmosphere conducive to a significantly improved decisional product. Such being the case, the necessity of Appeals Council review is much less. In any event, the claimant will be able to proceed to the District Court less than a year after filing his/her application rather than the more than two years which is currently the case. The claimant's interests are better served by the two step appeals process.

THE PROPOSAL DOES NOT ADEQUATELY PROTECT THE DUE PROCESS RIGHTS OF CLAIMANTS

In order to adequately protect the claimants' right to due process of law, the Social Security Administration must accept the fact that the disability determination is a "legal rather than medical" determination.

While the Proposal is somewhat more generous in the area of due process than most pronouncements from the Social Security Administration, NTEU does not believe the due process rights of the claimant are adequately protected by the Proposal.

While the Proposal advocates creating a single body of authority which is controlling upon adjudicators at all levels which is an improvement over the current bifurcated structure, it does not address the issue of court created law. Administrative Law Judges have consistently stated that by oath, they are committed to applying controlling court created law. NTEU strongly concurs with that commitment. The Social Security Administration must accept that it is subject to the law of the land whether that law is statutory or court created. NTEU recognizes the difficulties inherent in properly applying case law to SSA's administrative adjudications require a high degree of legal expertise found only in attorneys. Of course the same can be said of properly applying the principles of substantive and procedural due process itself.

NTEU is pleased that the Proposal recognizes the right of the claimant to secure representation by an attorney and has committed SSA to clearly explain that right to its claimants. NTEU also supports the establishment of qualifications for non-attorney representatives to ensure that claimants receive competent representation and to provide a forum for claimants to air grievances against non-attorney representatives. NTEU does not support similar requirements for attorney representatives and vigorously contests any attempt by the Agency to provide a forum to conduct disciplinary or malpractice actions involving attorneys. Each state provides a forum in which attorneys practicing in that jurisdiction can be held accountable for their actions. Permitting the Social Security

Administration to conduct such proceedings would grossly interfere with the attorney-client relationship. Further, such procedures would permit SSA to intimidate those attorneys and could be used to degrade the quality of service received by the claimant.

NTFU has no objection to placing primary responsibility for developing the evidence upon the claimant's representative and removing that responsibility from the adjudicator. However, NTFU vigorously opposes any attempt to place the responsibility for developing the evidence upon any unrepresented claimant whether or not SSA thinks that claimant is capable of bearing that burden. The Social Security Administration must continue to remain responsible for developing the record for all unrepresented claimants.

NTFU has no objection to the concepts set forth in the Proposal regarding the Methodology for Deciding Disability Claims (the new four step sequential evaluation). However, any comment upon the methodology itself is impossible until SSA develops standards such as the Index of Disabling Impairments, the Instruments that will provide a Standardized Measure of Functional Ability, and identifying the Baseline Occupational Demands That Represent Substantial Gainful Activity.

NTFU rejects the Proposal's Evidentiary Development provisions. The Proposal states that SSA will develop a standardized form which effectively tailors the request for evidence to the specific diagnostic and functional assessment information necessary to make a disability decision. This would permit sources to submit evidence electronically. SSA will accept the statement on the standardized form without resorting to the traditional, wholesale procurement of actual medical records. SSA would accept a certification that the sources have the medical documents to which they refer and will produce them if requested. This is consistent with evidence collection methods use by private disability insurance carriers. The Proposal contains a statement which it attributes to an Appeals Council Analyst (not an attorney position) that "We tend to ask doctors for what they have instead of what we need." Stated another way, that statement might be "we get the evidence that is rather than the evidence we want". The cavalier treatment of evidence, which after all should be at the very basis of the decisional process graphically depicts the complete lack of understanding by SSA regarding the sanctity of legal process. Few, if any, attorneys would rely upon such summaries of the actual evidentiary documents to present their case and few judges would accept such summaries in lieu of the actual documents themselves as a basis for decision making. The Proposal would reduce the adjudication process, a process in which the claimants are unquestionably entitled to due process of law, to the level of claims processing performed by private disability insurance carriers. The A.P.A. hearings conducted by SSA's Administrative Law Judges are legal proceedings conducted by the government of the United States of America, not the claims processing mechanism of an insurance company. There can be no more cogent argument for Congress ensuring that the Social Security Administration respect the "legal" nature of the disability process than the Agency's plans regarding treatment of evidence. To fully protect the claimants' right to due process Congress should demand that SSA entrust the disability determinations to those professionals with the appropriate legal education.

Claimants clearly expressed a desire to make their case directly to the decision maker. Internal SSA studies (as yet unpublished) reveal that face-to-face contact between the claimant and the decision maker has a measurable effect on the decision at all levels of adjudication. While the Proposal provides the claimant with an opportunity for a personal interview before issuing the initial denial determination, it does not endorse providing the claimant with the opportunity to make his/her case directly to the decision maker. "The purpose of the predenial interview will be to advise the claimant of what evidence has been considered and to identify what further evidence, if any, is available that bears on the issue." The current language of the proposal appears to afford the opportunity for the claimant to present his case to the Disability Claims Manager but in fact does not do so. This is a prime example of the bad faith of the Agency as pertaining to its statements regarding its commitment to affording its claimants due process of law. Congress must be vigilant if claimants are to be protected from such perfidious behavior.

¹Disability Process Reengineering Team, *Disability Process Redesign*, (U.S. Department of Health and Human Services, Social Security Administration, SSA Pub. No. 01-002), p. 50.

All of the above items are factors regarding due process and appeal rights. While the Proposal itself does not adequately protect the claimants' due process rights, NTEU is even more concerned that the Social Security Administration will continue to create and implement policies with blatant disregard for due process of law. Many senior SSA officials have consistently voiced a preference for the "medical determination" philosophy. This attitude was consistently conveyed in the Process Review Report on The Office of Hearings and Appeals.

"This priority includes processing title (sic) II and title (sic) XVI disability cases. It is aimed primarily at two aspects of the disability programs: 1) improving the accuracy and timeliness of the medical-decision making process; and 2) assisting people with disabilities to return to work.

Improving timeliness and accuracy in the process of making medical decisions involves changes specific to the disability process ... " (Emphasis mine)⁶

"Decision makers who have mostly legal training, but must decide primarily medical issues." (Emphasis mine)⁷

Unfortunately, allocation of human resources including position classification have often been predicated upon a desire to impose the "medical determination" philosophy upon the Office of Hearings and Appeals leading to counterproductive use of assets such as replacing highly qualified Attorney Advisors with at best lesser qualified and at worst unqualified paralegal specialists at the Office of Hearings and Appeals, of limiting the independence of Administrative Law Judges, ignoring clearly applicable court rulings, and arbitrarily denying claimant's applications.

The Administrative Law Judges and particularly the Association of Administrative Law Judges, Inc. have waged a long and persistent campaign to protect both procedural and substantive due process in the disability adjudication process. However, only Congress has the might to effectively preclude SSA from depriving its claimants of their basic rights. Reengineering the disability process has great potential for significantly improving the level of service provided to the public, but if and only if, the desire of SSA to fatally restrict due process of law is thwarted.

Congress must insist that the disability determination be a "legal rather than a medical" decision and take such steps to effectuate that position including demanding a process which vigorously protects the claimants' interest above those of the bureaucracy and insist on an adjudicatory process consistent with the principles of due process.

THE PROPOSAL ADEQUATELY ADDRESSES THE ISSUE OF INSURING TIMELY DETERMINATIONS

The Disability Process Reengineering Team demonstrated that while the initial disability determination procedure requires 155 days, over 13 hours of actual task time is consumed by SSA and DDS employees. At the initial level scheduling consumes approximately 20 days, paper movement consumes 30 days, and queue backlog consumes approximately 40 days. While the process through the hearing decision consumes 550 days, only 32 hours of task time is expended. At the hearing level scheduling consumes approximately 120 days, paper movement consumes approximately 100 days, and queue backlog consumes approximately 180 days. At the hearing level approximately 400 of the total 550 days are wasted.

Reengineering addresses the problem of inordinate amounts of unproductive time by reducing the current four step administrative adjudicatory process to a two step process. Elimination of the reconsideration stage which consumes approximately 100 days but only results in a reversal rate of

⁶ The Social Security Strategic Plan - A Framework For The Future (U.S. Department of Health and Human Services, 1991), p.63.

⁷ Process Review Report - The Office of Hearings and Appeals, (Social Security Administration, 1991), p. xi.

the initial determination of 14% and which if it is adverse to the claimant, is appealed 75% of the time is certainly prudent. Likewise eliminating the claimant's right to appeal an adverse ALJ decision to the Appeals Council reduces the length of time required for the administrative appeals process, although the cost to the claimant is probably greater than the elimination of the reconsideration stage. Because there are only two levels of adjudication in the reengineering proposal, the claimant need appeal on only one occasion after filing. This results in fewer "hoops" through which the claimant must jump and a substantial reduction in queue time.

However, the reengineering proposal does far more to reduce processing time than merely delete two of the current levels of adjudication. An entirely new claims processing system is created in which one individual, the Disability Claims Manager (DCM), assumes responsibility (and accountability) for processing the claim at the initial level. The DCM is the decision maker at the initial level and will be supported by a team of medical and technical experts. This procedure significantly reduces the number of time consuming hand offs and markedly reduces the queue time which plagues the current system. The Disability Process Reengineering Team estimates that its recommended changes will reduce the length of the initial determination phase to approximately 50 days. While NTEU believes this is an overly optimistic estimate (evidence collection will be more time consuming than planned), nevertheless, the proposed process would substantially reduce the initial adjudication phase.

The big time savings are realized at the hearing phase. Elimination of the reconsideration level alone results in a substantial savings in processing time. Even greater savings in time can be realized through implementation of the proposed claims processing system in which an Adjudication Officer (AO) is responsible for explaining the hearing process to the claimant, conducting prehearing conferences, identify issues in dispute and prepare stipulations for those issues not in dispute, develop the record, and issue favorable decisions on the record when appropriate. Responsibility (and accountability) for preparing the record for hearing will be assumed by one individual thereby reducing time consuming handoffs and queue backlog. It is the responsibility of the AO to ensure the record is complete at the time of the ALJ hearing so that post-hearing development is usually unnecessary. The scope of the authority and responsibility of the Administrative Law Judge is essentially unchanged from the current situation except he/she is relieved of the day to day responsibility for overseeing prehearing matters.

The case for eliminating the Appeals Council appeal as a matter of right for the claimant is not as clear cut as that for eliminating the reconsideration level. The prime negative factor (from the claimant's point of view) is the slowness of the appeals process at the District Court level. Given the rarity of outright reversals by the Appeals Council (4%) and the slowness of the current system at the hearing level, the loss of the right of appeal to the Appeals Council does not overly burden the claimant.

The net result of the changes in the disability determination process as projected by the Disability Process Reengineering Team are indeed substantial, reducing the total time for the administrative process from the current 750 days to 150 days. While NTEU again feels this estimate is overly optimistic, there is little doubt that the proposed process would reduce total administrative processing time by more than 50 % of the current time. There is also little doubt that the proposal, if properly implemented, would result in an adjudication system that would result in faster, more accurate decisions while actually reducing costs to the Agency.

THE PROPOSAL COULD RESULT IN AN ADJUDICATIVE PROCESS WHICH RESULTS IN FAR FEWER ERRONEOUS DECISIONS

The Proposal addresses the two primary causes of decisional inaccuracy and if SSA treats the disability determination as a "legal decision" and staffs its decision making position accordingly, decisional accuracy can be substantially increased. The importance of SSA accepting that the disability determination is a legal question and that the level of legal expertise required at all the decision making positions can only be met by attorneys-at-law cannot be over-emphasized. The quality of the decision can never be any better than the quality of the decision maker.

Providing comprehensive employee training including a program of continuing education is important in assuring a competent work force. However, education, not training, characterizes the best employees for a reengineered work place.

"If jobs in reengineered processes require that people not follow rules, but rather that they exercise judgment in order to do the right thing, then employees need sufficient education so that they can discern for themselves what that right thing is. Traditional companies typically stress employee *training* —teaching worker how to perform a particular job or how to handle one specific situation or another. In companies that have reengineered, the emphasis shifts from *training* to *education* — or to hiring the educated. Training increases skills and competence and teaches employees the "how" of a job. Education increases their insight and understanding and teaches the "why".⁶

An even handed quality assurance program examining equal percentages of favorable and unfavorable decisions will eliminate the pressure applied at the state agency level to err on the side of denial and reduce the tendency at the hearing level to err on the side of a favorable decision.

THE PROPOSAL DOES NOT ADDRESS THE ISSUE OF COST OF THE PROCESS

By design the proposal makes no attempt to quantify costs involved in the proposed process, nor does it present a cost-benefit analysis.

CONCLUSION

The Social Security Disability determination process is broken. The antiquated process created in the mid 1950's is not adequate to meet the needs of the 1990's and beyond. The Disability Reengineering Proposal constitutes a radical solution to the current problem. The Disability Process Reengineering Team led by Rhoda M.G. Davis is to be commended for its work, vision and courage for proposing such a comprehensive redesign of the disability process. Implementation of reengineering principles will correct many of the problems that currently plague the disability process.

The most significant weakness of the proposal involves its and the Agency's lack of commitment to provide claimants with due process protections during the adjudication process. While the Proposal is more enlightened in this area than is usually the case for the Social Security Administration, it nonetheless fails to understand that the disability process is a legal proceeding rather than a medical determination, and that the institutional procedures and personnel should more closely resemble those of an impartial court (particularly at the appeals level) than the claims processing department of an insurance company. The Congress must ensure that the Social Security Administration accepts that the disability determination process is a legal proceeding and that its structure and procedures are consistent with that reality. Because the disability determination is a legal decision, NTEU believes that consistent with the language of the Report of the Health and Benefits Committee, National Conference of Administrative Law Judges, American Bar Association dated February 6, 1994 and subsequently adopted by the Association of Administrative Law Judges, Inc., all the decision makers in the disability determination process be highly trained legal professions, attorneys-at-law. This will best ensure that claimant is afforded due process of law throughout the process.

NTEU recognizes that the Proposal is silent on many area of vital concern such as the new regulatory standards for determining disability. Until these matters are finalized, it is impossible to adequately assess whether reengineering the disability process is advisable. Nonetheless, with this caveat and if the Agency finally accepts the premise that disability determination is a legal proceeding and adequately protects the due process rights of claimants, NTEU is convinced that reengineering the Social Security disability process will result in vastly improved service to the public by decreasing processing time, improve the accuracy of decisions at all levels of adjudication, protect the claimants' due process and appeal rights, and provide a high level of service to claimants who required assistance in developing a claim for benefits.

⁶Michael Hammer and James Champy, *Reengineering the Corporation*, (New York: HarperCollins Publishers, Inc., 1993), p.74.

Chairman JACOBS. Thank you, Mr. Hill.
Mr. Arner.

STATEMENT OF FREDERICK B. ARNER, KENSINGTON, MD.

Mr. ARNER. The proposal of the SSA team is quite revolutionary. It discusses issues that are not new, but they have been dormant. But details are vague, as many of the witnesses have pointed out. It does two major things: It changes the adjudicative structure and it changes the methodology standards. Both of these are quite major undertakings that cannot be done lightly.

The idea of combining the evidence development and adjudication function in the front process is designed to increase accountability and uniformity, lower processing time and improve the quality of adjudication. I agree, it may reduce processing time, but the other objectives are much more questionable.

I have grave reservations about putting the case manager adjudicators in 1,000 or so district offices throughout the country, without a firstline review of their decisions or a reconsideration correction process. It will create maybe 1,000 more disability programs, rather than the 54 we have today, and result in further deterioration in the disability cost experience, which has not been discussed too much in this hearing.

I would suggest, instead of using the district office structure, that we use disability centers. This was recommended by the Hale Champion-Dan Marcus study in the Carter administration and my study for the Sloan Foundation.

In these centers, there will be enough medical and vocational resources, plus line supervision—

Chairman JACOBS. I am sorry, can you wait for just a little while. The subcommittee will stand in recess.

[Recess.]

Chairman JACOBS. I am sorry, Fred. It is a grandstand day for amateur criminologists in the U.S. House of Representatives. Go ahead. [Laughter.]

Mr. ARNER. Are you going to break Mr. Natcher's record?

Chairman JACOBS. Beg pardon?

Mr. ARNER. Are you going to break Mr. Natcher's record?

Chairman JACOBS. No, but I will probably break yours for interruptions. [Laughter.]

I am sorry, go ahead.

Mr. ARNER. What I said is I think this implies that we have a federalization. I cannot see any other way of setting it up. And then you have the immediate problem, do you have the personnel? I do not think you have them in the district offices now, so you are going to have to tap the State agency personnel, if you set up such adjudicators.

To do this, you are going to have to set up some procedures for being able to take over these State personnel, and I refer you to James Burke's bill in 1978. You will remember that. [Laughter.]

He provided a whole procedure for taking over State agency employees and dealing with the nitty-gritty problem of—

Chairman JACOBS. God knows what Jimmy is providing now for God.

Mr. ARNER. But you will remember the cigar, anyway.

Actually, it will be a little easier now from a fiscal standpoint, in that the State salaries have caught up with the Federal salaries, so it is not going to be quite as expensive as it was previously.

The second big issue is the revision of decision methodology. I agree with Martha Ford and Professor Diller and Thomas Sutton that we have a real problem here. It is very vague. They are going to throw out the grids. I would refresh your memory about the grids. We were in a similar situation in 1975-76 as we are today. The Disability Trust Fund was going broke in a year or two, like it is now, and one of the problems was lack of uniformity and adjudication throughout the State agencies. In 1976, the subcommittee had a big hearing on the grids and we got the advance copy of the grids and brought in expert witnesses to testify about them. Finally, they were put into effect in 1979 and 1980. So it takes a long time to formulate these things, and I think their replacement is going to take a long time, too.

I guess my little problem with the Social Security Administration, is that in the interim they did not pay much attention to the grids. They kind of died from lack of notice and SSA did not make revisions on them over the years. They gave up training vocational specialists in the central office. So I do not think you have very many vocational specialists out in the State agencies at the present time. What is proposed is a big change and it has got to be thoroughly explored, and I agree with those people that have reservations about that.

Finally, I think equally important is the development of the Social Security independent agency bill, which I guess is progressing through the Congress. It has passed the Senate, I think. And the Jacobs-Bunning Social Security appellate court bill should also be passed.

Chairman JACOBS. You can call it the Arner bill, if you want to.

Mr. ARNER. I think this would be a good first step for SSA and the Congress to regain the disability policy function from the more extreme actors of the advocate community. I did get back at them a little.

Chairman JACOBS. I only wish you were testifying before the Judiciary Committee right now. You do not need to convince me.

[The prepared statement follows:]

Testimony before Social Security Subcommittee
on the Disability Process Redesign, April 14, 1994

Frederick B. Amer

The proposal of the SSA team appears to be the most revolutionary change in the disability process in years. It raises issues not new but dormant for a long time. But many of the details are vague, perhaps intentionally so. It proposes both a new disability administrative adjudication structure and a fundamental change in the standards and methodology of making such adjudications. These two developments are separable in my view and don't necessarily depend on each other. I also find somewhat ominous the statement by the director of the study that "successful total implementation of a redesigned disability process is the existence of the INS/LAN architecture that SSA has planned for further modernization of its processing systems". This sounds like the "systems tail" wagging the "disability determination" dog.

Adjudicative Structure Change

The idea of combining the evidence development and adjudication function in one office is designed to increase accountability, uniformity, lower processing time, and improve quality of adjudication. I agree that it may reduce processing time but the other objectives will go unmet. I have grave reservations that putting case managers-adjudicators in a 1000 or so district offices throughout the country, without a first line review of their decisions or a reconsideration correction process, will create a 1000 disability program rather than the 54 we have today and result in further deterioration in disability cost experience. I would suggest that the creation of Disability Centers as suggested by the Hale-Champion-Dan Marcus study committee in the Carter Administration and by my study for the Sloan Foundation where there will be enough medical and vocational resources plus line supervision to better effectuate quality and uniformity. How CDRs, if any, would be conducted under the proposed system is not revealed.

The suggested structure seems to imply the elimination of the State disability agencies. If this is done it is essential that the Federal Government be able to pick up qualified examiners from the State agencies. Such personnel do not currently exist in the District offices. Probably existing law will need to be changed to do the job. Current law envisions state administration and requires "substantial failure" and a hearing for a State to be forced to withdraw from the process. Although there have been many States who should have been removed from the program in the past, it would be a distortion to carry out a general Federal takeover under current law. The law also requires that before a State can be removed the Secretary of Labor must determine that the State agency employees, not being hired by the Feds, are being taken care of by State from a host of standpoints including job preservation etc. This provision, a Senate amendment in 1980, makes the termination of a State very difficult and new legislation seems to be required if federalization is contemplated.

When the Chairman of this Subcommittee, James A. Burke, proposed a federalization or partial federalization of the process in 1978, his bill(H.R. 8076) addressed this with specific reference to the employees who would be converted, what salary should be paid to the converted employees, what fringe benefits should be paid to these employees based on their State service(such as accumulated sick leave), what credit should be given for their State time for pension, RIF and other purposes. Conditions have changed and such legislation would have to be reformulated but these are the nitty gritty decisions which have to be faced. One administrative cost consideration in federalization has been lessened in that State salaries have increased much more than Federal salaries in recent years. For instance, in 1982 the comparable Federal average salary and the State agency average salary were both about \$22,000. By 1988 the Federal salary had risen to \$28,000 but the State salary had jumped to \$34,000. This trend has continued I believe.

Revision of Decision Methodology

This is a complicated subject which is hard to evaluate from the bare bones material presented. The major question in my view is whether the reduced role of doctors in the adjudicatory process is a good thing. Under long standing practice every decision has to be signed by a state agency doctor and the lay disability examiner. Moreover the doctor is supposed to do the RFC. Reasonable people differ on the role of doctors and the State agencies have very different approaches. Some States have fairly heavy participation by doctors while in others it is pro forma at best. Under the plan the case manager-adjudicator will make the decision after consultation with medical sources if necessary. The availability of doctors to adjudicators is going to be difficult with the number of district offices and it would seem that the disability centers approach would be a much better vehicle for marshalling medical resources.

A red flag should also go up on the greatly expanded role of the treating physician. One part of the plan is that "in completing standard forms, treating sources will certify that they have in their possession the medical documentation referred to in the statement and said documentation will be promptly submitted at the request of SSA. ... SSA will monitor treating source completion of the standardized forms and verify evidence when appropriate." It is my understanding that some types of medical evidence such as EKGs and X rays don't scan into the computers so that the system will cut out those frills or certify their existence.

The rationale for establishing the medical-vocational "grids" was to reduce subjectivity and to provide more uniformity in adjudication throughout the country. In recent years we have seen a very substantial and unprecedented growth in med.-voc allowances under the grids. This may have played a significant role in adverse experience in recent years that has affected the fiscal condition of the trust fund. Some would say that SSA has not been particularly dynamic in keeping the "grids" up to date and has a very poor record in training vocational specialists in the States. But what is proposed is exploration in a particularly swampy area which will bring a preponderance of cases under functional evaluation and may well further increase subjectivity in the system. The Social Security Subcommittee held extensive hearings on an early draft of the grids in 1976 and they weren't finally approved until 1979/1980. SSA admits that currently it does not have "available standardized measurement criteria" for documenting functional ability. They say their goal is to develop such criteria that is "universally accepted by the public, the advocacy community, and health care professionals" and that "a functional assessment with history and descriptive medical findings will become an accepted component of a standard medical report". I wouldn't hold your breath on this one.

Social Security should be an independent agency and this should have the potential of greatly increasing accountability and uniformity in the disability programs. But the SSA administrators and overstratified disability bureaucrats in Baltimore also need an attitudinal change which will get their heads out of the sand. The deteriorating experience in these programs can no longer be ignored. The Congressional Research Service has just pointed out that in "just the last 4 years 1990-1993, their programs grew by \$20 billion , or by 62 percent ... and are now the fourth largest category of entitlement spending". The Trustees report just released indicates that the disability fund will be exhausted next year. Finally, it is also important that the Congress pass the Jacobs-Bunning bill (H.R. 3265) which would be a good first step for SSA and the Congress to regain the disability policy determination function from the more extreme actors of the advocate community.

Chairman JACOBS. Mr. Robert.

**STATEMENT OF CHARLES ROBERT, ESQ., ROBERT, LERNER,
BIGLER, ROCKVILLE CENTRE, N.Y.**

Mr. ROBERT. Thank you for inviting me.

I would like to talk about an area that no one has talked about yet called nonacquiescence, because, no matter what happens here, no matter what proposal comes up from the Social Security Administration, until the Social Security Administration agrees to acquiesce to court decisions or appeal them to the Supreme Court, we will continue to have a fragmentation of the system, which in my opinion is a great part of the complications.

We have acquiescence rulings, nonacquiescence rulings, Social Security rulings. We have a breakdown of the system, of the basic fundamental rule of law, and that comes from a belief that is still in place in the present administration that the executive branch, on its own, is equal to the judiciary in interpreting the intent of Congress.

My experience has been 14 years of litigating this issue, and I am still litigating it, the same case, because what has happened is the executive branch, on its own, concludes that the circuit court is incorrect, does not appeal a case they lost, does not go to the Supreme Court, and then puts in a policy, not by public rulemaking, not by statute, but a secret policy, if you will. And I can say it is a secret policy, because when we try to establish how that policy was derived at, we cannot find out what the policy is, because of the attorney-client privilege.

What we have now derived in 1994 is a government agency with more trade secrets than the tobacco industry, and at least the tobacco industry is—

Chairman JACOBS. It does not look like very many since this morning. [Laughter.]

Mr. ROBERT. That is right, which is exactly the point today. Right now, there are secret policies that the Social Security Administration, unrevealable to the public, especially when you get into a reengineering project, where we have got this hopefully lack of an adversary system, a cooperative effort between the claimant and the Social Security Administration working to try to apply a statute.

But as long as we have secret policies not regulated, not subject to public rulemaking—there was a case of *Georgetown University v. Bowen*, in 1988, and Justice Scalia and Justice Kennedy said, in a nice clear ruling: “The judiciary will defer to the executive branch, when the Congress is not clear, there is no specific statements in the legislation. And if rulemaking goes through, the judiciary will respect the executive branch decisions, but only after public rulemaking.”

What has happened is, with the acquiescence ruling and the nonacquiescence policy, executive branch attorneys, through their own interpretations of the statute, being a de facto Supreme Court, do not appeal circuit court decisions, make policy then not by rulemaking, and in effect, as I view it, having litigated for 14 years, not acquiescing to the Supreme Court decision of *Georgetown Hospital*, which says, make your rulemaking, executive branch, we

have to follow it. If you do not make rulemaking, the judiciary will not defer to the appellate council's litigation strategy.

What has happened with acquiescence rulings and the nonacquiescence policy, these are executive branch attorneys who do not like the judicial decisions and do not appeal them. Solution: Your bill coming up on taking the whole system into a special court system, or, if we continue the present policy—Acting Commissioner McSteen in 1985 addressed this issue to the Judiciary Committee, one of the subcommittees—the same problem we had in 1974, when the Judiciary Committee was going to enact legislation to prohibit by statute nonacquiescence.

Rather than enact legislation, the HHS people swore under oath, with a good system, I thought, to set up an internal policy review committee where they would look at these tough issues, and if they did like a circuit court decision, they would appeal it to the Supreme Court, and then we would get the decision by the Supreme Court. It never happened.

Two things did not happen: The legislation was never enacted, because it deferred to the executive branch to solve it, and then the executive branch's solution to the problem was never enacted. And here we are in 1994 with the same issue we had back in the early 1980s, and to my clients, SSI recipients, they do not have attorneys or few attorneys doing it.

What you have then is the legal standard applied to the general population, is the "incorrect decision," because the circuit courts already ruled in a wrong decision, if you appeal that "wrong legal standard" to a court, you win. We always win, but only if you have an attorney. Because only when you go to court will you have the "correct legal standard" applied by the judiciary. Meanwhile, the "incorrect standard," as determined by the judiciary, but the "correct standard" as determined by the executive branch attorneys, unreviewable, de facto Supreme Court, that is applied to everybody else.

Now you put it into this reengineering project, even with the computer, I guess we have got one for this circuit, one for that circuit. In my area, I have been trying to get regulation that applies to Indiana, Illinois and Wisconsin, a regulation only to the Seventh Circuit applied to my constituency. I cannot. So you have a regulation not applied. We have acquiescence rulings not applied. The whole system broke down, in my opinion, because the rule of law has not been followed by executive branch officials, including attorneys, not respecting judicial decisions or appealing those decisions to the Supreme Court.

In summary, until you solve the acquiescence problem either by your legislation or, in my opinion, the legislation that was almost enacted on July 25, 1984, prohibiting nonacquiescence or allowing it only if there is a justifiable reasonable belief that that would take the case to the Supreme Court. That is the only time the executive branch should not follow a judicial decision.

Thank you.

[The prepared statement follows:]

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
April 14, 1994

RE: PROPOSAL TO RESTRUCTURE THE SSA DISABILITY DETERMINATION PROCESS AS AFFECTED BY THE PRESENT HHS NONACQUIESCENCE POLICY- testimony of Charles Robert.

Chairman Jacobs and Members of the Subcommittee, thank you for the opportunity to present comments and recommendations for the Subcommittee to consider when reviewing the "SSA Disability Reengineering Report" from the perspective of an attorney representing SSA claimants.

My comments will be limited to the recommendation that Secretary Shalala should administratively abandon the 1981-1994 HHS nonacquiescence policy in order that the goals of the "reengineering" project of simplicity and efficiency can be accomplished. As long as Secretary Shalala continues to implement the HHS nonacquiescence policy, the reform of the SSA Disability Determination procedures will fail because uniform and equal standards will not be applied to SSD and SSI recipients in all 50 States.

In addition, as long as unequal standards are applied in a national program, claimants and their families will continue to have a basis to lack trust in their government's fairly and efficiently administering a needed program. This is because when an Executive Branch agency decides that a court "incorrectly" decided a decision and decides not to appeal that decision, then the Executive Branch of government's own unreviewable conduct reveals to its most vulnerable citizens and their families a disrespect for the "rule of law."

Presently, because of the HHS nonacquiescence policy, different legal standards are used in different judicial circuits and those standards have not been established by public rule-making pursuant to the Administrative Procedure Act. As a result, Secretary Shalala is adjudicating SSD and SSI claims by the use of a bizarre and complex set of "secret" standards whereby these standards are not being equally applied to claimants who reside in the 50 States.

This DOJ-HHS nonacquiescence policy issue is now being litigated in pending Ruppert-Gordon III litigation. In this litigation, Attorney General Reno has ratified the HHS nonacquiescence policy of past Administrations by not enforcing SSA statutes and regulations equally. The pending litigation raises the Constitutional issue whether President Clinton and Attorney General Reno are fulfilling their Article II, Section 3 duty to "...take Care that the Laws be faithfully executed." See Coenan, The Constitutional Case Against Intra-circuit Nonacquiescence. 75 Minn. L. Rev. 1399 (1991).

The continued implementation of the 1981-1994 HHS nonacquiescence policy as part of the SSA "reengineering" procedures will result in Secretary Shalala creating a "reengineered" disability determination project that will not be administered simply or uniformly. Therefore, if Secretary Shalala decides not to administratively abandon the present HHS nonacquiescence policy, then the Congress should consider enacting legislation to prohibit the Secretary from continuing to implement the present HHS nonacquiescence policy.

As part of the legislative changes to implement the goals of the SSA "reengineering" project, the Congress should consider enacting a statute that incorporates the change in HHS procedures as explained by Secretary Heckler's witnesses to the July 25, 1985 House Judiciary Subcommittee on Administrative Law and Governmental Relations, but which were not implemented by Secretaries Heckler, Bowen, Sullivan, or Shalala. If Congress enacts this legislation, when the new SSA procedures are applied as a result of the SSA "reengineering" plan, equal statutory and regulatory standards will be applied to all SSD and SSI claimants.

A. The 1994 HHS nonacquiescence policy.

The present HHS nonacquiescence policy was developed in 1981 by HHS General Counsel Juan del Real and then-Domestic Advisor Edwin Meese. Over the last 13 years, the HHS Secretaries have codified this policy in an elaborate set of published regulations, Nonacquiescence Rulings, Acquiescence Rulings, Social Security Rulings, unpublished Program Operations Manuals (POMS), and internal HHS and DOJ litigation decisions not to appeal "incorrect" judicial decisions and not to follow the legal principle of *stare decisis*. This has resulted in "secret" legal standards that are used by the Secretaries' adjudicators of fact in different circuits which are not the legal standards as determined by regulations or by federal court decisions. See Application of circuit court law, 20 C.F.R. § 404.985 (for the SSD program) and 20 C.F.R. § 416.1485 (for the SSI program).

This HHS nonacquiescence policy is based on former-Attorney General Meese's "coordinate Branches of Government" theory that the Executive Branch has equal authority to the Judiciary to interpret the intent of Congress. Based on this theory, the Secretary's appellate counsel now act as a "de facto Supreme Court" and decide which cases were "correctly" decided and to be followed and which cases were "incorrectly" decided and only to be followed as the law of that individual case. A second key decision for the Secretary's appellate counsel is to decide which unfavorable judicial cases involving policy decisions are to be appealed.

The Executive Branch's use of *inter-circuit* nonacquiescence litigation strategy has long been recognized as being Constitutional in cases involving the IRS or the Department Labor. In those cases, the Department of Justice determined not to appeal adverse decisions made by district and circuit court of an individual case was not considered to be an appropriate one to defend on appeal to the Supreme Court. As a result, the Executive Branch limited the district or circuit court holding to that district or circuit, by not appealing the case and waiting to appeal the same issue in a more favorable case from a different circuit.

When applied to HHS cases, the Secretary has expanded the nonacquiescence policy strategy to both an *inter-circuit* (as and between the circuits) and *intra-circuit* (within the circuit) litigation strategy. This HHS nonacquiescence policy is based on the premise that the SSD and SSI claimants will appeal what they believe is the use of an "incorrect" legal standard in their circuit. Then, if the HHS claimants appeal decisions, the legal issue will percolate in the different circuits, and, over time the legal issue will be presented to the Supreme Court. See 20 C.F.R. § 16.1485 (c)(1)(iii). However, this is a false premise because, at least as to SSI recipients, most of the applicants and claimants do not have access to legal counsel who will appeal cases to circuit courts. See Bowen v. Schweiker, 108 S. Ct. 892 (1987) in which Supreme Court deferred to the Secretary's decision not to withhold contingency attorney's fees in SSI cases.

This has meant that legally defenseless claimants have no ability to appeal the Secretary's use of a legal standard that the Judiciary had previously determined was an "incorrect" standard. As a result of the HHS *inter-circuit* and *intra-circuit* nonacquiescence policy, Secretary Shalala now applies the "incorrect" legal standards, as determined by the Judiciary, to all SSD and SSI claimants who do not seek a judicial review of the Secretary's use of the "incorrect" legal standard.

Thus, if one of the goals of the SSA "reengineering" plan is to simplify the SSA appeal process, then there should be only one set of uniform legal standards used in all 50 States, applied equally to all SSD and SSI recipients regardless of the State of residence. If the HHS nonacquiescence policy is not ended, then the same complexity in the present SSA disability determination policy will continue in the "reengineered" program.

B. The July 25, 1985 House Judiciary Subcommittee testimony that the pre-June 3, 1985 nonacquiescence policy of HHS General Counsel del Real and Attorney General Meese was to have ceased.

At a July 25, 1985 Oversight Hearing of the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary: Judicial Review of Agency Action: HHS Policy of Nonacquiescence, Secretary Heckler's witnesses, Acting Social Security Commissioner Martha Mc Steen, former-Deputy Assistant Attorney General Carolyn Kuhl, and Assistant General Counsel Donald Gonya, testified under oath that the pre-July 25, 1985 HHS nonacquiescence policy had ceased. However, with a hindsight view based on the post-July 25, 1985 nonacquiescence litigation and the January 11, 1990 promulgation of the Secretary's Application of circuit court law regulations, 20 C.F.R. § 404.985 and 20 C.F.R. § 416.1485, that July 25, 1985 House Judiciary Subcommittee testimony was not accurate.

This Subcommittee should consider reviewing Secretary Heckler's witnesses' sworn July 25, 1985 testimony and enacting legislation based on Secretary Heckler's witnesses explanation to Members of Congress of the "new" acquiescence policy. If implemented, the "new" acquiescence policy as explained to the July 25, 1985 House Judiciary Subcommittee would have been consistent with the 1994 SSA reengineering team's suggestions to simplify the SSA and SSI programs. That July 25, 1985 testimony balanced the need for SSA uniformity with the preservation of Executive Branch flexibility to administratively respond to what are considered "incorrect" legal decisions. The 1985 plan advised that HHS would have a "Policy Review Committee" to review court decisions and, in consultation with the Department of Justice, appeal the "incorrect" decisions to the Supreme Court.

On July 25, 1985, Secretary Heckler's SSA Commissioner Martha Mc Steen, under oath, explained to Members of Congress the new post-June 3, 1985 "acquiescence" policy, at Tr. 7:

Mr. Chairman, I know the questions have been raised about this new policy, but I believe we have done our best to reconcile the need for national uniformity and efficiency with the wide variety of interpretations of the law by circuit courts. *Id.* at 7. Emphasis added.

.... We will obey the court directives. We want to follow the congressional mandate. We are very concerned about the individual beneficiaries, and fourth, we must ensure that we have a uniform method of operating and apply those standards uniformly. So we debated the issue of how to implement our policy with great care and with consideration as to how that should take place and where it should take place. *Id.* at 19. Emphasis added.

On July 25, 1985, Deputy Assistant Attorney General (DAAG) Carolyn Kuhl also testified under oath, and on behalf of Attorney General Meese, explained the new post-June 3, 1985 "acquiescence" policy to Members of Congress, at Tr. 10:

Under its new policy, the Social Security Administration acknowledges that, to some extent at least, nationwide uniformity is no longer possible. The Secretary of Health and Human Services will follow circuit precedent in making final benefit determinations, except in those few cases presenting an issue which HHS, in consultation with the Solicitor General, determines should be relitigated in order to urge reconsideration of a rule of law in a circuit or to seek potential Supreme Court review. Thus, as it applies to the courts, this policy means that we will follow circuit precedent when the Department of Justice enters the proceedings-- that is in the district court-except where the Justice Department and HHS agree that the issue should be litigated further. ..

However, the conferees did suggest a policy change-- and here I quote again:

The conferees urge that a policy of nonacquiescence be followed only in situations where the Administration has initiated, or has the reasonable expectation and intention of initiating, the steps necessary to receive a review to the issue in the Supreme Court.

Now, this is essentially the policy that will now be followed, although the policy will also accommodate a situation where the Justice Department intends to ask a circuit court to reconsider prior precedent and has a reasonable expectation that the court may be amenable to reconsideration, thus making resort to the Supreme Court unnecessary.

The new policy reverses the prior nonacquiescence policy, except insofar as is necessary to preserve the Solicitor General's flexibility to ask a court of appeals to reconsider prior circuit precedent in appropriate circumstances, or to seek Supreme Court review to adverse precedent . . .

Thus, under the new acquiescence policy, Health and Human Services will follow circuit precedent in making the agency's final determination with regard to Social Security benefit claims, except in those few cases which HHS, in consultation with the Solicitor General, determines should be relitigated in order to urge reconsideration of a rule of law in a circuit or to seek potential Supreme Court review.

This policy is designed to assure that the agency's final decision is in accord with circuit precedent in the vast majority of cases while preserving the necessary discretion of the Solicitor General to occasionally ask a court to reconsider prior rulings.

The criteria which the Solicitor General will use in deciding when to ask a court of appeals to reconsider earlier precedent in the Social Security disability area will not differ from the criteria applied by the Solicitor General in deciding to ask that circuit precedent be reconsidered in any other area of law.

We believe that the new policy will eliminate those aspects of the prior nonacquiescence policy which had been a source of friction between the Government as a litigant and the courts, while preserving the flexibility necessary to adequately represent the Government's litigation interest. We believe it is wise litigation policy to acquiesce in circuit precedent except where the issue is ripe for reconsideration by the circuit court or where the Government intends to seek rehearing en banc or Supreme Court review.
Emphasis Added.

As explained in more detail in Section C, the HHS nonacquiescence policy as explained on July 25, 1985 by Secretary Heckler's witnesses to Members of Congress, was not the acquiescence policy that was implemented by Secretaries Heckler and Bowen. This was because Attorney Generals Meese and Thornburgh implemented a post-July 25, 1985 nonacquiescence litigation strategy which defended the decisions of the Secretary's Policy and Review Committee that circuit courts had rendered "incorrect" decisions. In these "nonacquiescence" cases, contrary to the July 25, 1985 testimony of DAAG Kuhl, Solicitor Generals Fried and Starr were instructed not to petition the Supreme Court for writs of certiorari of the "incorrect" legal decisions. See the discussion of the Jackson, Hickman, Ruppert-Stone, and Ceguerra decisions.

The claim that the sworn July 25, 1985 testimony to Members of the House Judiciary Subcommittee that the nonacquiescence policy had ended was inaccurate sworn testimony, was reviewed by "high level" DOJ Justice Department attorneys. Assistant Attorney Generals Richard Willard and John Bolton specifically reviewed the Ruppert plaintiffs' complaint to Deputy Attorney General Arnold Burns that the July 25, 1985 testimony of DAAG Kuhl to Members of Congress was not accurate. However, they both determined that there had been no wrongdoing. See in particular the universe of documents AAG Willard reviewed in coming to this conclusion which are in the custody of Attorney General Reno in the FOIA withheld documents in Robert v. Dieffenderfer, cv-90- 3403, and which include the hardcopy of the DOJ Executive Secretariate Electronic Mail X 70871499, which has the hardcopy E-mail menu with the denomination that "THIS DOCUMENT MUST BE DISPOSED OF BY SHREDDING."

In summary, the SSA "reengineering" reform procedures will not simplify the disability determination process as long as Secretary Shalala does not implement the reforms presented in the July 25, 1985 sworn testimony to Members of Congress. Thus, this Committee should consider enacting legislation if Secretary Shalala decides to continue the pre-July 25, 1985 and the post-July 25, 1985 nonacquiescence policy which will thwart the SSA "reengineering" reforms.

C. Attorney General Reno has ratified Secretary Shalala's application of the pre-July 25, 1985 HHS nonacquiescence policy of former-HHS General Counsel del Real and former-Attorney General Meese.

Pursuant to 28 U.S.C. § 516, the Department of Justice makes all litigation decisions for the Secretary of HHS. Over the past 13 years, Attorney Generals Smith, Meese, Thornburgh, and Reno have all ratified the implementation of HHS nonacquiescence policy. This has resulted in a legion of federal court cases in which the SSD and SSI claimants had the judicially "correct" legal standard applied to the facts of their case only because they filed appeals in the already overburdened federal courts.

In 1994, Attorney General Reno has ratified Secretary Shalala's application of the HHS nonacquiescence policy of former-HHS General Counsel del Real and former-Attorney General Meese whereby legally defenseless SSD and SSI claimants continue to have the judicially determined "incorrect" legal standards applied by the Secretary's adjudicators of fact to the facts of unappealed cases. This raises the sensitive 1994 issue whether President Clinton and Attorney General Reno are fulfilling the Article II, Section 3 duty that the President "... shall take Care that the Laws be faithfully executed" as applied to legally defenseless SSI claimants. See Coenan, The Constitutional Case Against Intra-circuit Nonacquiescence, 75 Minn. L. Rev. 1399 (1991).

My experience with the DOJ and HHS nonacquiescence policy began in 1975 when a 90 year old SSI recipient Minnie Glasgold had her SSI benefits reduced by the value of a bagful of groceries that she was given by her retired 65 year old son because her monthly SSI income was not sufficient to pay for both her rent and her food. The Glasgold litigation evolved into the 1980 "Ruppert" litigation regarding a 20 year old retarded SSI recipient who was denied SSI benefits because the legal standards applied by the Secretary's adjudicators of fact were not the legal standards that were established pursuant to the Secretary's duly promulgated regulations. Other SSI clients appealed the Secretary's reduction of their SSI benefits because of the receipt of Christmas presents, Birthday presents, toilet paper, and other miscellaneous gifts that the Secretary determined should be "pawned" in order to reduce monthly SSI benefits. Glasgold v. Schweiker, 558 F.Supp. 129 (E.D.N.Y. 1982), Ruppert at p. 151, aff'd sub. nom. Rothman v. Schweiker, 706 F. 2d 407 (2d Cir. 1983), cert. den. sub. nom. Guigno v. Schweiker, 464 U.S. 984 (1983). Ruppert v. Bowen, 671 F. Supp. 151 (E.D.N.Y. 1987), aff'd in part, rev'd in part, Ruppert v. Bowen, 871 F. 2d 1171 (2d Cir. 1989).

During the 1981-1994 Ruppert litigation, Attorney Generals Smith, Meese, Thornburgh, and Reno vigorously defended the implementation of the HHS nonacquiescence policy of Secretaries Schweiker, Heckler, Bowen, Sullivan and Shalala at every level of the appellate process. As the Ruppert litigation progressed and other Ruppert-related plaintiffs exhausted

administrative remedies and sought relief in federal court, the legal standards applied to SSI recipients changed. The Secretary's appellate counsel developed new standards in response to the litigation. However, these new standards were not promulgated pursuant to the requirements of the Administrative Procedure Act and public rule making. See discussion of the Secretary's decision not to "acquiesce" to Georgetown Hospital v. Bowen, 109 S. Ct. 468 (1988) at Section E, below.

The 1994 "Ruppert" litigation revolves around the issue of what legal standard Secretary Shalala is to use when computing monthly benefits for SSI recipients who have appealed the denial of SSI benefits and received "in kind" income from non-legally responsible relatives during the appeal process in order to survive and not be prematurely institutionalized. See SSI income regulation, 20 C.F.R. § 416.1130, amended in 1980 by the elimination of the phrase "actual availability" as a definition of countable income. The Ruppert plaintiffs seek a judicial remedy because the Secretary's appellate counsel decided that the Second Circuit "incorrectly" decided the March 29, 1989 Ruppert decision. Contrary to the July 25, 1985 sworn testimony to Members of Congress that the Secretary would petition the Supreme Court for a Ruppert writ of certiorari, on July 16, 1990 Secretary Sullivan issued, ex parte, a Ruppert Acquiescence Ruling that continued to count as in-kind income the receipt by SSI recipients of a private rent subsidy that did not result in an actual economic benefit to the SSI recipients. 55 FR 28947 (July 16, 1990).

The "smoking gun" proof of the DOJ 1994 ratification of the continuation of the pre-July 25, 1985 nonacquiescence policy after July 25, 1985, is found in the promulgation of the April 21, 1986 "Jackson" regulation, which codified at § 416.1130 (b). However, this "actual economic benefit" standard is only to be applied to SSI recipients who reside in the States of Indiana, Illinois, and Wisconsin. Jackson v. Schweiker, 673 F. 2d 1076 (7th Cir. 1982) and Jackson v. Schweiker, 581 F. Supp. 871 (N.D. Ind. 1984). The Seventh circuit "Jackson" regulation was not applied to SSI recipients who reside in the other 47 States. This limited application of the "Jackson" regulation to three States was made notwithstanding the fact that the Secretary's appellate counsel informed the House Judiciary Subcommittee that the Jackson was not a "nonacquiescence" case. See House Record at p. 31-41.

Notwithstanding the fact that Members of Congress were advised that Jackson was not a "nonacquiescence" case, throughout the Ruppert litigation, both before and after July 25, 1985, Attorney Generals Meese and Thornburg argued that the Jackson case had been "incorrectly" decided. The Ruppert plaintiffs now seek a 1994 judicially ordered remedy whereby Secretary Shalala is ordered to comply with the Georgetown Hospital standards and promulgate a "Ruppert" regulation whereby the SSI regulations are applied equally to Second Circuit SSI recipients.

Attorney General Reno's 1994 defense of Secretary Sullivan's and Attorney General Thornburgh's Ruppert intra-circuit nonacquiescence policy, is now pending in the Second Circuit in a Ruppert-related case, Gordon III v. Secretary. Second Circuit Docket No. 94:6011. After the March 29, 1989 Second Circuit Ruppert remand, the Secretary's appellate counsel determined that the Second Circuit had "incorrectly" decided Ruppert, and Attorney General Thornburgh, contrary to the July 25, 1985 testimony of DAAG Kuhl, did not petition the Supreme Court for a Ruppert writ of certiorari. On July 16, 1990, Secretary Sullivan, ex parte, without any public rule-making or judicial approval, issued the Ruppert Acquiescence Ruling (55 F.R. 28947) which explained the Secretary's private rent subsidy policy to be applied only prospectively in the Second Circuit states of New York, Connecticut, and Vermont to those SSI recipients who are aware of the existence of the Ruppert Acquiescence Ruling.

Secretary Sullivan applied the Ruppert Acquiescence Ruling to the facts of Ruppert related plaintiff Gordon III, who had her Gordon I and II cases remanded to the Secretary in order for Secretary Sullivan to apply the Second Circuit March 29, 1989 Ruppert holdings to the facts of her case. On November 12, 1993, the district court held that the Ruppert Acquiescence Ruling, as applied by Secretary Sullivan in Gordon I, II, and III, was not

consistent with the Second Circuit Ruppert decision. Attorney General Reno appealed the Gordon III decision to the Second Circuit. The Gordon III Second Circuit argument will probably be held in the fall term.

An underlying Constitutional issue in the pending Ruppert-Gordon litigation is the fact that Attorney General Reno has ratified the prior policy of Secretary Sullivan not to follow Georgetown Hospital v. Bowen, 109 S. Ct. 649 (1988). As discussed in more detail in Section E below, in Georgetown Hospital, Justices Kennedy and Scalia clearly set the standard that the Judiciary will defer to the properly promulgated regulations of the Secretary, but not defer to the litigation strategy of the Secretary's appellate counsel. As a result of the ex parte issuance of the Ruppert Acquiescence Ruling, the SSI regulations are not being applied equally by Secretary Shalala, which again raises the sensitive Article II, Section 3 Constitutional issue whether President Clinton and Attorney General Reno are fulfilling their duty to "...take Care that the Laws be faithfully executed" as applied to legally defenseless SSI recipients in all 50 States.

Pursuant to 28 U.S.C. § 516, Attorney General Reno appealed the district court Gordon III decision with the knowledge that the decision that Ruppert was "incorrectly" decided was a decision of the Secretary's appellate counsel, and not a decision of the Secretary, and thereby directly contrary to the Georgetown Hospital holding. The "smoking gun" evidence that the decision that Ruppert was "incorrectly" decided was made by the Secretary's appellate counsel and not by Secretary Sullivan, is found in the Freedom of Information Act (FOIA) withheld Ruppert Counsel II v. Messick, cv-91- 2105, documents in the custody of Attorney General Reno.

If Secretary Sullivan had followed Georgetown Hospital, then he would have either applied the "Jackson" regulation to the Second Circuit states or filed a Notice of Proposed Rule Making (NPRM) to promulgate an amended SSI income regulation. The documents upon which Secretary Bowen promulgated the post-July 25, 1985 "Jackson" regulation, involving the same issue of the interpretation of the Secretary's SSI income regulation as occurred in Ruppert, are also in the custody of Attorney General Reno as the "disassembled April 21, 1986 Jackson APA documents" withheld in Ruppert Counsel I v. Bell, cv- 90-. Hence, Attorney General Reno has in her custody the universe of documents upon which the April 21, 1986 "Jackson" regulation was based after the July 25, 1985 sworn testimony of Secretary Heckler's witnesses that the pre-July 25, 1985 nonacquiescence policy had ceased, and the documents upon which was based the July 16, 1990 Ruppert Acquiescence Ruling. This "Acquiescence" Ruling was also issued after the Supreme Court had rendered its December 10, 1988 Georgetown Hospital decision.

Further proof of DOJ's ratification of the HHS continuation of the pre-June 3, 1985 nonacquiescence policy after the July 25, 1985 Congressional sworn testimony that the HHS nonacquiescence policy had ceased, are found in the actions taken by Secretaries Bowen and Sullivan in response to the unappealed circuit holdings in Hickman v. Bowen, 803 F. 2d 1377 (5th Cir. 1986), the March 29, 1989 Ruppert-Stone decision applying the Hickman holding to the Second Circuit States, and Ceguerra v. Secretary, 933 F. 2d 735 (9th Cir. 1991) applying the Hickman standard to the Ninth Circuit States. Those cases challenged the Secretary's "in kind loan" standard. Prior to these decisions, Secretaries Schweiker, Heckler, Bowen, and Sullivan determined that a loan from a non-legally responsible relative or friend to a cashless SSI applicant appealing a denial of SSI benefits could not be a loan unless "cash passed hands" between the debtor and the creditor.

The Hickman, Ruppert-Stone, and Ceguerra courts rejected the Secretary's legal standard that would not recognize cashless "in kind" loans of food and shelter to SSI recipients for whom the Secretary had denied SSI cash benefits. In direct contradiction to Secretary Heckler's witnesses' sworn July 25, 1985 testimony to Members of the House Judiciary Subcommittee, in the Circuits other than the Fifth and Ninth Circuits, the Secretary continued to use the legal standard rejected by the Judiciary.

After the 1986 Hickman decision, and on November 14, 1988, Secretary Bowen issued a Hickman Acquiescence Ruling. AR 88-7 (5), SSA Pub. No. 65-002. This "Acquiescence" Ruling stated that the "incorrect" Fifth Circuit Hickman decision would be applied only in the Fifth Circuit States of Louisiana, Mississippi, and Texas. After the Second Circuit rendered its March 29, 1989 Ruppert-Stone decision regarding the application of the Hickman holding to the Second Circuit States, the Secretary's appellate counsel decided that the Ruppert Court, like the Hickman Court, had "incorrectly" decided this issue and implemented a Ruppert-Stone intra-circuit nonacquiescence policy. See the universe of withheld FOIA requested Stone Counsel v. Bell, cv-91-1257, documents in the custody of Attorney General Reno.

In response to the Hickman and Ruppert-Stone decisions, on August 20, 1990, Secretary Sullivan filed a Notice of Proposed Rule Making advising the public that he planned to amend the "in-kind income loan" standards to moot the Hickman v. Bowen, 803 F. 2d 1377 (5th Cir. 1986) and Ruppert holdings that an in-kind income loan was not to be considered as income to reduce the monthly SSI benefits. 55 FR. 33922 (August 20, 1990). Thus, whereas Secretary Sullivan's appellate counsel recommended that the Secretary amend the SSI regulations regarding the "in kind income loan" standard to moot the "incorrectly" decided Hickman and Ruppert -Stone holdings, the Secretary's appellate counsel did not recommend that the Secretary promulgate a regulation to moot the "incorrectly" decided Ruppert decision as to the "actual economic benefit" private rent subsidy standard. See the Ruppert Counsel II and Stone Counsel documents.

Subsequently, on May 15, 1991 in the Ceguerra decision, the Ninth Circuit adopted the Hickman holding. Contrary to the July 25, 1985 House Judiciary Subcommittee testimony, the Secretary's appellate counsel did not recommend that the Secretary appeal the "incorrect" Hickman or Ceguerra decisions to the Supreme Court. As a result, the Secretary's appellate counsel continued the pre-July 25, 1985 nonacquiescence litigation strategy of former-HHS General Counsel del Real and former-Attorney General Meese that the Secretary's appellate counsel had the authority of a "de facto Supreme Court" to decide that circuit courts had "incorrectly" interpreted the intent of Congress.

Meanwhile, plaintiff Ruppert-Stone exhausted administrative remedies and challenged Secretary Sullivan's Ruppert-Stone intra-circuit nonacquiescence policy. On February 5, 1992 at a Second Circuit Stone IV v. Sullivan pre-argument conference, the Secretary agreed to acquiesce to the March 29, 1989 Ruppert-Stone holding and apply that holding retroactively and publish that fact. In July, 1992, the Secretary's appellate counsel determined to apply the Ceguerra holding only in the Ninth Circuit states of Arizona, Alaska, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. See the July, 1992 POMS 00835.481.

However, on September 8, 1992 Secretary Sullivan decided to end the Hickman-Ceguerra inter-circuit and Ruppert-Stone intra-circuit nonacquiescence policy as Secretary Sullivan rescinded the Hickman Acquiescence Ruling. Simultaneously, Secretary Sullivan issued SSR 92-8p. 57 F.R. 40918 and 40919 (September 8, 1992). This SSR 92-8p document was a statement of the Secretary's "new" policy which administratively "reinstated" the Secretary's "in-kind loan" policy which had been applied equally in all 50 States when the SSI program was enacted in 1974. SSR 92-8p explained that the Secretary, prospectively, would no longer apply the "cash must pass hands" between the debtor and the creditor standard for there to be a valid loan. A comparison of the September 8, 1992 SSR 92-8p, to the July, 1992 POMS 00835.481, to the February 5, 1992 Stone IV agreement, to the August 20, 1990 NPRM to moot the Hickman and Ruppert-Stone in-kind income loan holding, to the July 16, 1990 Ruppert Acquiescence Ruling Notice, to the withheld FOIA Ruppert Counsel II and Stone Counsel documents in the custody of Attorney General Reno, reveal how policy decisions as to legal standards applied were made by the Secretary's appellate counsel and not by the Secretary's regulations promulgated after public rule-making pursuant to the Administrative Procedure Act.

If Secretary Shalala intends to simply the SSA administration of the SSD and SSI programs with the "reengineering" plan, then Secretary Shalala must make sure that whatever new procedures are implemented, they allow President Clinton to fulfill his Article II, Section 3 duty to "...take Care that the Laws be faithfully executed." Secretary Shalala must equally apply the same regulations to SSD and SSI claimants who reside in all 50 States. However, as long as Attorney General Reno continues to ratify Secretary Shalala's *inter-circuit* and *intra-circuit* nonacquiescence policy, the SSI program and its regulations will not be applied equally to SSI recipients in all 50 States.

Hence, the importance of this House Oversight Committee reviewing the 1994 Executive Branch decisions, including the decision of Attorney General Reno to continue to implement the pre-July 25, 1985 HHS nonacquiescence policy of former-HHS General Counsel del Real and former-Attorney General Edwin Meese. If the SSA "reengineering" plan is to be uniformly applied to all SSA and SSI recipients, the Committee should consider directly asking Secretary Shalala whether the 1994 HHS nonacquiescence policy will be part of the new SSA reforms of SSD and SSI determinations.

D. All HHS policy standards should be established pursuant to public rule-making and not be based on the "secret" policies of the Secretary as determined by the Secretary's appellate counsel, which are subject to the attorney-client privilege, and thereby not made known to the SSA claimants.

One of the key features of the SSA "reengineering" proposal is the full participation of the claimant throughout the process. If the claimant is to be part of the adjudication process, then the claimant should have full access to the standards that are used in adjudicating the claim. However, because of the 1994 HHS-DOJ nonacquiescence policy, presently the claims are adjudicated by "secret" standards that are not revealed to SSA claimants because the HHS decision making process is protected by the attorney-client privilege as and between the DOJ and HHS. Thus, unless the "secret" nonacquiescence policy is ended, the claimant cannot be a full participant in a process in which policy decisions are made in secret in anticipation of claimants being in litigation with the Secretary.

On May 6, 1988, former-Assistant Attorney General John Bolton in a letter to the Administrative Conference of the United States (ACUS) explained this bizarre secret HHS-DOJ nonacquiescence policy. In 1988, ACUS was considering administrative proposals to limit the HHS-DOJ nonacquiescence policy. AAG Bolton explained that in order for the Secretary to implement the nonacquiescence policy, the decision makers could not reveal why a judicial decision was "incorrectly" decided, because the revelation would violate the attorney-client privilege:

Thus, if a process to identify conflicting court of appeals decisions and to decide whether to acquiesce is to work, it must be protected by attorney-client, and deliberative process privileges. In particular the work of an acquiescence review board, or of attorneys charged with such functions, would seem to be a virtual textbook example of the reasons why a work product privilege exists. Similarly, the classic description of the need for a decisional process privilege seem tailor-made for the acquiescence decision process.

If such new disclosure rules apply to all litigants, not just agencies, then acquiescence theory will have been used to create major, society-wide exceptions to privileges heretofore felt reasonable, with effects on the legal system far exceeding the more modest claims of opponents of nonacquiescence.

Whatever the ultimate result of the privilege issue, the immediate result of the uncertainty is to discourage agencies from adopting an acquiescence process,

or, at least from adopting the type of candid and effective process that comes only with the ability of subordinates and attorneys to give advice in a privileged context. Emphasis Added. Document secured from FOIA request granted by ACUS and available upon request.

The application of the secret HHS-DOJ nonacquiescence policy as explained by AAG Bolton to ACUS, is revealed in the universe of withheld documents in the Ruppert-related FOIA actions in the custody of Attorney General Reno and Secretary Shalala. Ruppert Counsel I v. Bell, Ruppert Counsel II v. Messick, Stone Counsel v. Bell, Robert v. Diefenderfer, Robert v. Doe, cv-89-4039, Robert v. Holz, cv 85- 4325 and other pending FOIA requested documents which are in the custody of the HHS and DOJ FOIA Officers. The requester, Ruppert plaintiffs' counsel, had sought the release of these documents which would reveal how the Secretary had determined that the Jackson, Hickman, and Ruppert decisions were "incorrectly" decided, after the July 25, 1985 testimony to Members of Congress that the pre-July 25, 1985 nonacquiescence policy had ceased.

These documents were also necessary in order for Ruppert plaintiffs carry their heavy evidentiary burden to prove that the Secretary had implemented a "clandestine policy" to use secret legal standards in computing SSI benefits. See the Supreme Court's holding in City of New York v. Bowen, 106 S. Ct. 2023 (1986) providing an equitable estoppel remedy if SSA and SSI recipients carry their heavy burden to prove a "clandestine policy" of the Secretary. In the Second Circuit, the FOIA withheld documents would reveal that the Secretary's appellate counsel decided to continue to use the "incorrect" legal standards in order to continue to input "phony" SSI income entries in order to reduce monthly SSI benefits, rather than acquiesce to the Second Circuit Ruppert holdings. See the contempt of court order in Hinton v. Bowen, 837 F. Supp. 234 (S.D.N.Y. 1990).

The FOIA requested documents were not released because the Second Circuit affirmed the DOJ's use of the FOIA Exemption 5 and the attorney-client privilege in Ruppert Counsel I v. Bell and Ruppert Counsel II v. Messick. However, these FOIA actions were decided prior to President Clinton's and Attorney General Reno's new October 4, 1993 FOIA guidelines. The new FOIA guidelines place a heavier burden on the Executive Branch agency when it seeks to prevent the release of documents that reveal how our country's government works. If in Gordon III, Attorney General Reno and Secretary Shalala continue to defend the secret Ruppert intra-circuit nonacquiescence policy as explained by former-AAG Bolton, then there will be a new round of 1994 FOIA actions, this time based on President Clinton's October 4, 1993 FOIA guidelines, rather than AAG Bolton's May 5, 1988 "secret" standards.

The universe of Robert v. Holz, Robert v. Doe, Ruppert Counsel I v. Bell, Ruppert Counsel II v. Messick, and Robert v. Diefenderfer withheld documents now in the custody of Secretary Shalala and Attorney General Reno, reveal the details of the secret pre-July 25, 1985 and post-July 25, 1985 HHS-DOJ nonacquiescence policy as applied in the Jackson, Hickman, and Ruppert litigation. Upon information and belief, these documents are subject to review by Members of Congress and will reveal to Members of Congress the fact that the July 25, 1985 sworn testimony of Secretary Heckler's witnesses, that the nonacquiescence policy of former-HHS General Counsel del Real had ceased on June 3, 1985, was not accurate. These documents also contain the HHS and DOJ documents which are the basis of Attorney General Reno's 1994 ratification and continuation of the secret post-July 25, 1985 DOJ nonacquiescence policy as applied in 1994 to SSI recipients in all 50 States.

As long as Attorney General Reno and Secretary Shalala continue to implement AAG Bolton's "secret" nonacquiescence policy, the "reengineering" reforms will be made on the basic premise that there is an adversary relationship between the Secretary and SSD and SSI claimants. If the SSA "reengineering" plan is to encourage full participation of claimants, then the "secret" HHS-DOJ policies should be made known to the claimants and their representatives in order to avoid otherwise unnecessary litigation. Full participation of claimants in the administrative process will occur only if the Secretary's policy decisions are made publicly and subject to the

rule-making process of the Administrative Procedure Act, and not made secretly as part of a clandestine litigation strategy protected by the attorney-client privilege.

E. The "reengineering" project should result in the Secretary following the Supreme Court holding in Georgetown Hospital v. Bowen whereby all policy standards should be publicly promulgated pursuant to the APA, and not be made by the Secretary's appellate counsel.

Upon information and belief, the Secretary will be implementing the reform procedures pursuant to public rule-making, unless there is explicit legislation implementing the reform procedures. See Chevron, U.S.A., v. Natural Resources Defense, 104 S. Ct. 2778, (1984). However, the Secretary has a policy and practice of not establishing policy standards pursuant to public rule-making, but rather implementing these policy decisions as part of the Secretary's appellate counsel's litigation strategy.

In Georgetown Hospital v. Bowen, 109 S. Ct. 468 (1988), Justice Kennedy clarified the Judiciary's deference to the Executive Branch and the "Chevron" administrative law principles, and the Judiciary's deference to the litigation strategy of the Secretary's appellate counsel:

We have never applied the principles of those cases to agency litigating positions that are wholly unsupported by regulations, ruling, or administrative practices. To the contrary, we have declined to give deference to an agency's counsel's interpretation of a statute where the agency itself has articulated no position then the question on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Id.* at 473. Emphasis Added.

The issue of a policy being made by the Secretary's appellate counsel as part of litigation strategy, and not by the Secretary after public rule-making and compliance with the APA, is one of the issues in the pending Ruppert-related appeal in the Second Circuit, Gordon III v. Shalala. If Secretary Sullivan had followed the Georgetown Hospital and Second Circuit Ruppert holdings, then there would have been no *intra*-circuit nonacquiescence issue for the Second Circuit to review. Based on Georgetown Hospital, the Second Circuit would defer to the Secretary's policy decisions which were implemented pursuant to the Administrative Procedure Act. See for example the Secretary's intent to moot the Hickman and Ruppert-Stone holdings regarding in-kind income loans by the August 20, 1990 filing of a Notice of Public Rule Making. 55 FR 33922 (August 20, 1990).

If Secretary Sullivan had followed the holding of Georgetown Hospital, then all the Secretary had to do was to extend the "Jackson" regulation to the Second Circuit states, or promulgate a "Ruppert" regulation, as was promulgated in the April 21, 1986 "Jackson" regulation. 20 C.F.R. § 416.1130 (b). If that public rule-making process had occurred, then there would be Judiciary deference to Executive Branch rule-making. However, the rule-making process did not occur, because the Secretary's appellate counsel determined that the Second Circuit had "incorrectly" decided Ruppert, and the DOJ decided, contrary to the July 25, 1985 House Judiciary Subcommittee sworn testimony of DAAG Kuhl, not to file a Ruppert petition for a writ of certiorari to the Supreme Court.

The "smoking gun" proof that the Secretary's appellate counsel did not follow Georgetown Hospital, is found in the universe of withheld FOIA requested Ruppert Counsel I and Ruppert Counsel II documents in the custody of Attorney General Reno and Secretary Shalala. Those documents reveal the reasons for the issuance of the July 16, 1990 Ruppert Acquiescence Ruling, rather than the adoption of a regulation to be applied to Second Circuit SSI recipients. Upon information and belief, those documents reveal the application of the AAG Bolton's "secrecy" theory as presented to ACUS, as those documents have been shielded from

the public by the use of the attorney-client privilege. Upon information and belief, an additional reason the documents have been withheld is because that would reveal that "high level" DOJ attorneys had actual knowledge that DAAG Kuhl's sworn July 25, 1985 testimony to Members of Congress that the pre-July 25, 1985 nonacquiescence policy of HHS General Counsel del Real and Attorney General Meese had ceased, was not accurate. See the hard copy of the universe of withheld Robert v. Diefenderfer DOJ Executive Secretariate documents and E-mail reviewed by AAG Willard in response to the Ruppert plaintiff's complaint to DAG Burns that inaccurate July 25, 1985 testimony was presented to the Members of the House Judiciary Subcommittee.

Notwithstanding the pending Ruppert-Gordon litigation, the entire process by which the Secretary issues "Acquiescence Rulings" is performed in secrecy and not subject to public rule making. Proof of that fact is evidenced by the growing list of "nonacquiescence" policy cases after the July 25, 1985 House Judiciary Subcommittee testimony which provided a baseline of then pending "non-acquiescence" cases. See July 25, 1985 Hearing Record at Tr. 31-41. As part of the post-July 25, 1985 HHS-DOJ nonacquiescence policy, the number of "nonacquiescence" cases has increased yearly, as evidenced by the publication of the "Acquiescence" Rulings.

The tension between the Secretary's decision making pursuant to public rule-making and continuing the secret nonacquiescence policy, occurred almost immediately after the July 25, 1985 sworn testimony to Congress that the pre-July 25, 1985 nonacquiescence policy had ceased. In August, 1985, the Justice Department began its review of the HHS "Acquiescence Task Force." That process was discussed in Stieberger II v. Sullivan, 738 F. Supp. 716 (S.D.N.Y. 1990), based on documents reviewed *in camera* by the Court:

Defendants strenuously protest that the views of the Task Force are no more than views of "someone somewhere in the Government who (was) not charged with litigating the case." Defendants Memorandum at 30. While the Court is aware that the views expressed by the Task Force are not SSA policy statements, the observations of a body within the agency charged explicitly with "screening cases for acquiescence" are obviously highly relevant to the Court's inquiry, especially to the extent they differ from the arguments of counsel for SSA. (cites omitted) at n. 36. While the Justice Department is clearly entitled to formulate the government's position with respect to whether agency policy and Second Circuit holdings differ, this cannot preclude the Court from considering the observations of a body with some interest in objectivity like the Task Force in assessing whether the Justice Department's position is accurate. Id. at n 14. Emphasis added.

The secrecy that was immediately made a part of the post-July 25, 1985 HHS Policy and Review Committee continues to this day. The Secretary refuses to reveal the reasons why the Secretary's appellate counsel have determined that key circuit court decisions have been "incorrectly" decided. This is the because the Secretary's appellate counsel continues to make policy decisions which are shielded by the attorney-client privilege. As a result, these policy decisions continue to be as part of the Secretary's appellate counsel's litigation strategy, rather than pursuant to public rule-making as per the holding of Georgetown Hospital v. Bowen.

Thus, if the SSA "reengineering" project is to reform the present SSA policies, then whatever policies the SSA develops, should be made publicly and pursuant to the Administrative Procedure Act. If these policies continue to be made as part of the secret HHS-DOJ litigation strategy, then Secretary Shalala and Attorney General Reno are expanding Attorney General Meese's "coordinate Branches of government" theory to include a policy and practice of not following a Supreme Court decision, Georgetown Hospital v. Bowen.

F. The elimination of the Reconsideration and mandatory Appeals Council appeal steps should result in the initial claims representatives and the ALJs using the legal standards established in Federal Court unless the Department of Justice has decided to appeal the case as per the July 25, 1985 House Judiciary subcommittee testimony.

If Secretary Shalala decides not to abandon the HHS nonacquiescence policy, then the Congress should enact legislation that requires the Secretary to apply the legal standards as determined by a Federal Court. The exception to this policy should occur when the Department of Justice has determined to appeal the case to the Supreme Court. See Acting Commissioner Mc Steen's and DAAG Kuhl's July 25, 1985 House Judiciary Subcommittee sworn testimony. See also 20 C.F.R. § 416.1485 (c)(2). In this way, if the Secretary eliminates the reconsideration and mandatory Appeals Counsel appeals, there will be a uniform set of standards equally applied to all claimants, even if they do not appeal an initial decision.

If the Secretary's present nonacquiescence policy continues after implementing the "reengineering" reforms, then with the elimination of the reconsideration and mandatory Appeals Council levels of review, the initial claims representatives and the ALJs will not be applying equal standards to SSD and SSI claimants. Rather, these adjudicators of fact will be applying the present 1994 bizarre and complex patchwork of secret legal standards.

Since the "reengineering" plan anticipates only a randomly selected post-adjudicative national sample review of the initial adjudications and given the present complexity caused by the 1994 nonacquiescence policy, there is a built in guarantee that the initial adjudications will not use a uniform legal standard in all 50 States. This will result in the continued need for appeals, as the agency will apply the correct legal standards only after litigation. The legally defenseless will continue to have the "incorrect" legal standard applied to the facts of their cases. Without an appeal, SSD and SSI claimants will have to rely upon the luck of the random audits to ensure that the legal standards as intended by the Congress, as interpreted by the Judiciary, are applied to the facts of their cases.

As the "reengineering" plan will not require a mandatory appeal to the Appeals Council, one of the roles of the Appeals Council to harmonize ALJ decisions to obtain uniform standards, will be eliminated. The application of the uniform HHS policy by the Appeals Council has been severely strained by the January 11, 1990 HHS nonacquiescence policy as explained in the Application of circuit court law "activating events" for relitigation after the publication of an Acquiesce Ruling. 20 C.F.R. § 416.1485 (c)(1)(i), (ii), (iii), (iv), (2), (3), (d), (e), (1), (2), (3),and (4).

The proposed "reengineering" plan is for the Appeals Council, to review the ALJ decision after the filing of a federal court action. This will force those SSD and SSI clients who have access to legal resources to file federal court actions whenever the Secretary's initial adjudicators of fact and the ALJs apply incorrect legal standards. If the HHS nonacquiescence policy continues, this may mean even more federal litigation, with the Equal Access to Justice Act (EAJA) statute becoming the main deterrence to the Secretary's continued application of "incorrect" legal standards.

In summary, the elimination of the reconsideration and Appeals Council levels of appeal will streamline the appeal process, but only if Secretary Shalala's implementation of the HHS nonacquiescence policy ends. Thus, if Secretary Shalala and Attorney General Reno will not voluntarily end the 1994 implementation of the pre-July 25, 1985 nonacquiescence policy of former-HHS Juan del Real and former-Attorney General Edwin Meese, then the Congress should consider enacting legislation based on the July 25, 1985 sworn testimony of Secretary Heckler's witnesses who explained to Members of Congress the Secretary's new "acquiescence" policy.

F. Summary

Upon information and belief, Attorney General Reno, Secretary Shalala, and HHS General Counsel Harriet Raab, are not aware of the fact that the DOJ and HHS attorneys are continuing to implement the pre-July 25, 1985 nonacquiescence policy. This is because the same DOJ and HHS employees who implemented the post-July 25, 1985 nonacquiescence policy of former-HHS General Counsel Juan del Real and former-Attorney General Edwin Meese continue to make the HHS and DOJ nonacquiescence decisions for Attorney General Reno and Secretary Shalala, upon information and belief, without the knowledge of Attorney General Reno, Secretary Shalala, and HHS General Counsel Raab.

Hence, the importance of this House Oversight Hearing to review these significant SSA reforms as they are affected by the 1994 continuation of former-Attorney General Edwin Meese's "coordinate Branches of government" theory. Thank you for your consideration of this presentation that the "SSA Reengineering Project" will not accomplish its goals as long as the complex and secretive HHS nonacquiescence policy continues.

Charles Robert, Esq.
Robert, Lerner, Bigler, Esq.

Chairman JACOBS. Good. As a matter of fact, I suppose most people remember President Jackson's famous statement in the Indian cases in Florida, "Marshall has made his decision, now let him enforce it." Of course, that was nonacquiescence with the Supreme Court decision. Even Truman did not do that.

Mr. ROBERT. It is still happening in this Georgetown case, because policy decisions are being made without public rulemaking and not subject to—

Chairman JACOBS. There is a lot of resistance in the Judiciary Committee, as I am sure everybody knows, to creating any new system of the courts. I think we have a case of enormously compelling need. One of the constitutional tests for a criminal statute, which is ignored all the time over there, is certainty. Constitutional interpretation of the validity of statutes in our country, is one of the basic rules, at least in criminal cases. It should apply otherwise in the spirit.

Mr. ARNER. But if you pass your bill, this will meet your problem, does it not?

Chairman JACOBS. Mr. Robert said that, but do not look at me. You forget, I used to be on the Judiciary Committee. I am not there any more.

Mr. ARNER. You have to go over there and get it pushed. Are they reluctant?

Mr. JACOBS. It is Mr. Arner's bill, really.

Mr. ARNER. No, that was the Social Security court. It went farther. But certainly your bill is a step forward and it would take care of the acquiescence problem.

Chairman JACOBS. Mr. Alfonse or Gaston or—

Mr. ARNER. You and Mr. Bunning.

Chairman JACOBS. Anyway, it is a good thing to do. We need to lobby some of the members of the Judiciary Committee, who, quite understandably, are not conversant with the enormity of the problem, and you described it very eloquently, Mr. Robert.

Mr. ROBERT. Which Congressmen should we be contacting on that?

Chairman JACOBS. Well, how many Members are on the committee? Somebody said in this hearing that if you set up a computer that would give everybody \$1 million, a lot of people would resist just because it would be a change. That is human nature. If you know how to shoot pool one way, you do not want to be taught how to shoot pool the right way, because it is awkward until you learn how to do it. So that is what we are up against. Public attention has a lot of competition for it. I do not know exactly what we are going to do to get this passed, but it makes so much sense, that I presume it will pass. If that is true, then justice delayed is justice denied and all of that.

I thank the panel. I apologize to you. It was not the loftiest of reasons that we continued this hearing, but it was good of you to come back.

The subcommittee is adjourned.

[Whereupon, at 1:47 p.m., the hearing was adjourned.]

[Submissions for the record follow:]



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May 13, 1994

The Honorable Andrew Jacobs, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The American Bar Association welcomes the opportunity to participate in this national dialogue on the Social Security Administration's Disability Process Redesign Proposal, and requests that these comments and attachments be included in the record of the April 14, 1994, Hearing before the House of Representatives, Committee on Ways and Means, Subcommittee on Social Security.

As representative of the legal profession in the United States, the American Bar Association is particularly concerned with equal access to justice for those members of our society who are generally least able to protect their own rights -- low-income persons, individuals with disabilities and older people. The Association is committed to promoting improvements within the entire justice system, by advocating for adequate funding for, and timely access to, each element of that system, including administrative agencies. We have had a long-standing interest in the Social Security Administration's disability benefits review process, and have worked actively over the years to promote increased efficiency and fairness in this system. We are well aware that the quality of decisionmaking can have a profound effect on the lives and well-being of millions of Americans, and that for many claimants, Supplemental Security Income and Title II Social Security benefits constitute the sole source of income and access to health care.

In 1985 the ABA joined with the Administrative Conference of the United States (ACUS) to sponsor a symposium on the Social Security Administrative Appeals process. The symposium produced a set of recommendations that resulted in the development of an extensive policy statement adopted by the ABA House of Delegates in 1986. Also in 1986, the Association filed an

amicus curiae brief in the landmark U.S. Supreme Court case, Bowen v. City of New York, in which the Association argued successfully that the Social Security Administration should reopen the cases of thousands of mentally disabled claimants who were denied disability benefits because they failed to meet sub rosa requirements and appeal deadlines. Brief for the American Bar Association, Amicus Curiae, in Support of the Respondents, Bowen v. City of New York, 476 U.S. 467 (1986).

Since then, in 1986 and again in 1991, the ABA has adopted additional policies aimed at further improving the disability claims process and protecting the rights of persons who are already receiving or who may be entitled to benefits. Also in 1991, this Association urged Congress to enact the Homeless Outreach Act, requiring SSA to undertake affirmative efforts in locations where homeless people congregate, to ensure that eligible individuals receive the benefits to which they are entitled. Most recently, at its 1994 Midyear Meeting, the ABA went on record in support of the goals and objectives of the SSI Modernization Panel. Copies of the 1986 and 1991 Resolutions are attached.

We commend the Social Security Administration for devoting the time and resources to redesigning the disability claims process, and look forward to continuing our involvement.

Initial Intake and Case Development.

We wholeheartedly support efforts to improve the quality of medical and vocational evidence collected at the initial stages of the disability process, and agree that front line workers could assume more responsibility for developing the claim and making the initial determination. Surely, face-to-face contact with a decisionmaker is preferable to the current situation, in which medical entitlement issues are decided by the state Disability Determination Service without seeing the claimant. This proposal has a great deal of potential, assuming that disability claim managers are well-trained, have sufficient technical and administrative support, and can refer less than routine medical questions to a medical consultant, if necessary. Given the complex nature of many claims, the ABA has recommended in the past that decisionmaking authority be vested in two-member teams, including a disability examiner and a medical or psychological professional. We encourage the Social Security Administration to consider this option.

Upon application for disability benefits, claimants must be informed about the claims process, and assisted in the full development of their claims. They should be provided with a clear description of eligibility requirements; responsibilities of the claimant and the agency, including the elements of proof at each level of the process; the nature of relevant medical and vocational evidence; and the availability of legal representation. All information should be available in alternative formats.

We agree that many claimants, either independently or with the assistance of a representative or other agent, should be encouraged to take responsibility for providing documentation in support of their claim. However, many persons eligible for disability benefits are unable, as a result of their disability, or because of linguistic or cultural barriers, to follow through on certain tasks. Moreover, few claimants have a legal representative to assist them at this stage of the process. We therefore encourage the Social Security Administration to take affirmative steps to compile accurate documentation and to supplement reports (particularly those from treating physicians) that are not sufficiently detailed or comprehensive. We support the Reengineering Team's decision to emphasize the value of evidence available from a treating source.

Denial of Claims and Appeals Procedures.

The ABA supports the Reengineering Team's proposal to have the disability claim manager contact the claimant if it appears that the claim will be denied, and to offer the claimant an opportunity to meet with the decisionmaker and to submit additional information in support of the claim. If the claim is denied, claimants should receive a clear and detailed statement that includes the reasons for denial, an explanation of appeal rights, the availability of representation, the consequences of appeal, and the effect a failure to appeal may have on future applications.

In 1991, the ABA recommended significant changes in the initial level of the disability claims process, including eliminating the reconsideration level, and providing direct appeal to an administrative law judge. If the quality of intake and development of evidence is improved, there should be little reason for reconsideration, particularly given the historically low reversal rate and delays involved at this level. We are pleased that the Reengineering Team is considering such changes.

While this Association has no specific policy on the use of adjudicative officers in management of pre-hearing development, we are open to consideration of proposals for alleviating the substantial delays that currently exist at the hearing level. We must be assured, however, that creation of this new position will not simply evolve into a different form of reconsideration, albeit in another part of the agency, and that it will not abrogate the administrative law judges' ultimate responsibility for deciding claims, or compromise the principle of independent decisionmaking at this stage of the process. We are in accord with the recommendations that the ALJ hearing continue to be non-adversarial, and based on a de novo review of the evidence.

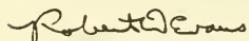
The ABA has advocated for many years for a complete study of Appeals Council procedures and functions, to determine whether such review is necessary and to explore possible changes in the Council's role. The Reengineering Team proposes to eliminate automatic Appeals Council review of ALJ decisions, thereby permitting a dissatisfied claimant to appeal immediately to Federal court. The Team also proposes to continue the Appeals Council's discretion to review ALJ decisions on its own motion, and, in a new development, to have the authority to review all claims in which a civil action has been filed, in order to determine whether the agency decision should be defended as the final decision of the Secretary. Fully aware of past attempts to control the rates at which ALJs allowed claims (e.g. the Bellmon Review), we caution that the independence and impartiality of administrative law judge decisionmaking must not be compromised by discretionary review. The scope of such review should be limited to clear errors of law or lack of substantial evidence for factual conclusions (the latter based on specific documentation and review of the hearing tapes).

Disability Decision Methodology.

Although the ABA has not specifically addressed this issue, we are troubled by the Reengineering Team's attempts to redefine disability under the guise of streamlining the claims process. We urge the Subcommittee to reject any efforts to redefine disability through either regulatory or statutory changes as part of the redesign process. We agree that revision of the basic definition of disability as utilized by the agency may indeed be appropriate, given our society's evolving understanding of disability. However, a proposal of this magnitude must involve a comprehensive review of legal and policy implications, and of the practical impact on those who would be affected by such fundamental changes. The current reengineering process has provided neither the time nor the forum for careful analysis of such complex issues.

Thank you for your consideration. We appreciate the Subcommittee's careful attention to these very important issues, and look forward to continuing the dialogue. Please call upon us if you have any questions.

Sincerely,



Robert D. Evans

Enclosures

Resolution of The American Bar Association
Adopted by the ABA House of Delegates, August 1991

BE IT RESOLVED, That the American Bar Association recommends that Congress enact legislation amending the Social Security Act that would require the Secretary of Health and Human Services to implement the following practices at the initial determination process of disability claims.

1. Provide claimants with a clear written statement-
 - * of applicable eligibility requirements;
 - * of the claimant's responsibilities in the disability determination process;
 - * of the administrative steps in the process;
 - * of the nature of relevant medical and vocational evidence; and
 - * of the availability of legal representation.
2. In gathering medical evidence,
 - * consult claimants' treating sources, including physicians, psychologists and medical facilities, and compensate them adequately for providing relevant medical information;
 - * assist claimants' treating sources by publishing and distributing informational materials regarding the eligibility criteria used in the disability program and the nature of the medical evidence needed to decide claims; and
 - * obtain evidence concerning claimants' symptomatology and limitations relative to their total functional capacity, including information from non-medical sources, such as social service workers, family members, previous co-workers and others who have been in regular contact with claimants.
3. Prior to the denial of claims
 - * notify claimants of pending adverse action;
 - * inform claimants of reasons why the finding of disability cannot be made and that they have access to all the evidence in their claims file, including medical reports;
 - * provide claimants with an opportunity to submit further evidence; and
 - * advise claimants' treating sources of any deficiencies in the medical evidence and give them an opportunity to supply additional medical information.
4. Provide claimants and their representatives with an opportunity to have a face-to-face interview with the agency decisionmakers before a final decision on the claim is made.
5. In making final decisions,
 - * vest decisionmaking authority in two-member teams, including a disability examiner and a medical or psychological professional;
 - * provide claimants who are denied benefits with a clear and detailed statement that includes the reasons for denial for the period covered by the application, the opportunity to appeal, the availability of representation, the consequences of failing to appeal, and any preclusive effect the denial may have on future applications; and

- * revise the Social Security quality assurance process to assure that claims are decided only after all evidence was properly developed, and require that a substantial number of denials are periodically reviewed prior to implementation.
- 6. Eliminate the reconsideration stage, with appeals from the final decision in the initial determination process going directly to an administrative law judge.

BE IT FURTHER RESOLVED, That the American Bar Association recommends that Congress enact legislation amending the Social Security Act to require the Secretary of Health and Human Resources take specific affirmative steps to ensure that applicants unable to adequately access the Social Security system, in particular homeless people, receive assistance in applying for benefits to which they may be entitled.

Resolution of
The American Bar Association
adopted by
The House of Delegates
August 1986

Be It Resolved. That the American Bar Association supports efforts to improve the administrative process utilized by the Social Security Administration in accordance with the following principles recommended by the Symposium on Federal Disability Benefit Programs.

I. Further Clarification of Disability Standards

- A. The Social Security Administration (SSA) should continue its efforts to clarify the definition of disability through the issuance of regulations open to notice and comment. Issuance of these regulations should not be unduly delayed by the Office of Management and Budget's review process.
- B. The standards utilized to determine eligibility should be consistent at all levels: in state disability determinations, SSA decisions (including ALJ determinations) and judicial decisions. To help ensure consistency, SSA should abandon its policy of intra-circuit non-acquiescence at all levels.
- C. SSA should foster and participate in future symposia and other meetings between SSA officials (including ALJs) and practitioners and others involved in the disability process.

II. State Level Procedures

A. Improve Quality of Initial Determinations

1. The initial application intake process should be improved. Productivity guidelines and form questionnaires used by SSA must be revised to promote development of complete, accurate information during the initial intake interview with the claimant.
2. Strong emphasis should be given to improving the quality of state determinations so that fewer appeals will be necessary.
3. Better training should be given to state disability examiners, and emphasis should be placed on the quality, not simply the speed, of their determinations. More realistic assessments of ability to engage in substantial gainful activity should be made by state disability determination offices.
4. SSA should implement the Social Security Disability Benefits Reform Act of 1984 by pursuing and evaluating demonstration projects with face-to-face interaction between claimants and decisionmakers at the earliest practicable levels.

B. Provide More Information to Claimants on Procedures and Burdens of Proof

1. Claimants should receive, at the earliest feasible point, clear information regarding the elements which they must prove at each stage of the disability determination process (including ALJ hearing).
2. Before any action is taken in a case, claimants should receive a report of the status of their file, along with copies of any records placed in their file by the government or any third party. Claimants should also receive notice of any information not in the file, which under normal procedures would have been included.
3. In particular, claimants should receive copies of all reports made by consultative and treating physicians and other specialists or experts.
4. SSA should carry through its intention to publish, and make widely available, portions of the Program Operations Manual System (POMS) that are relevant to handling and deciding disability claims.
5. SSA should promulgate regulations on how determinations of medical equivalency to the listings of impairment should be made.

C. Improve the Quality of Medical Evidence

1. SSA should give special weight to the reports of treating physicians and should communicate that policy throughout the system.
2. Vigorous efforts should be made to obtain treating physician's reports. When a treating physician's report is not detailed or comprehensive enough, every practicable effort should be made to obtain a supplemental report from the treating physician, and claimants and their representatives should be notified of this policy.
3. SSA should increase efforts to educate the medical community regarding the eligibility criteria used in the disability program and the kind of medical evidence SSA requires, in order to increase the number of physicians capable of meeting SSA standards and requirements.
4. Consultative examiners should be held to the highest medical standards in communicating with, examining and diagnosing applicants. Their reports should also be required to conform to the highest standards. The examiners should note the length and extent of the examination on the report.
5. Consultative physicians should be provided with all prior medical records available. SSA should periodically audit the performance of consultative physicians based on the consistency of their reports with prior and later medical opinions.
6. SSA should reconsider the usefulness of the Department of Labor's Dictionary of Occupational Titles in accurately describing the existing relationship between medical conditions and vocational opportunities.

D. Make the Quality Assurance Program More Constructive

The SSA's quality assurance program should strive to operate with objective criteria and should be based on regulatory guidelines. It should not be used primarily as a means to cut the budget. It should not limit itself to merely remanding cases, but should promote a constructive dialogue within the decisionmaking process.

III. Administrative Law Judge (ALJ) Hearings

A. Protect ALJ's Role as Facdfinder

1. Whether or not the claimant or government has a representative at the hearing, the role of the ALJ is special and should continue to require development of the factual record and close contact with the claimant. The hearing should not be conducted in an adversarial setting.
2. Performance reviews of the ALJs should be based as much on the quality of their product, as on the quantity of product.
3. SSA should ensure that staff attorneys be directly responsible to individual ALJs and that ALJs remain ultimately responsible for decisions. To that end, SSA should strive to hire sufficient staff attorneys so that individual attorneys are assigned to one or two individual ALJs.
4. Office of Hearings and Appeals (OHA) should continue to develop its practice and procedure manual for ALJ hearings.
5. SSA should encourage U.S. Attorneys to keep ALJs informed of all subsequent court actions pertaining to their decisions.
6. ALJs should be obliged to make individualized findings of fact that apprise claimants of the specific basis of decisions

B. Review Merits of Government Representation Project

1. SSA should develop and disseminate more statistical data on the Government Representation Project, including its effectiveness and fairness to claimants, and should continue to regard it as experimental.
2. SSA should examine carefully the cost-effectiveness of continuing the Government Representation Project.

*IV. Appeals Council**A. Limit Scope of Review*

1. The Appeals Council's scope of review should be limited to clear errors of law or lack of substantial evidence for factual conclusions. Moreover, the ALJ's findings as to witness credibility ordinarily should not be subject to review. If the Appeals Council overturns factual determinations by ALJs, it should cite specific reasons for doing so.
2. ALJ findings of fact should never be reversed without a review of the tape recording of the hearing by the Appeals Council.

B. Time Limit

Congress should provide that if the Appeals Council does not act upon a request for review within a specified period of time, then claimants are deemed to have exhausted their administrative remedies and may seek review in federal district court.

Be It Further Resolved. That the American Bar Association urges a complete study of Appeals Council procedures and functions to determine whether Appeals Council review is necessary and to suggest any needed changes in its structure, methods of operation, delegation of authority, and role as policy maker.

Be It Resolved. That the ABA opposes the enactment of H.R. 4647, H.R. 4419 and similar legislation to create an Article I Social Security Court to hear appeals from final decisions of the Social Security Administration.

**STATEMENT OF GLENN PLUNKETT
PROGRAM ASSOCIATE
AMERICAN COUNCIL OF THE BLIND**

This is testimony for the record on behalf of the American Council of the Blind (ACB) in the hearing of April 14, 1994 about the Disability Process Redesign before the Honorable Andy Jacobs, Jr., Chairman, Subcommittee on Social Security, Committee on Ways and Means.

The American Council of the Blind is a national membership organization established to promote the independence and well-being of individuals who are blind and visually impaired. By providing numerous programs and services, ACB enables blind and visually impaired people to live and work independently, contribute significantly to their communities, and advocate for themselves.

The Social Security Administration (SSA) is to be commended for its intensive effort to study and redesign the disability claims process. The disability process redesign proposal and background report of March 1994 has some very desirable recommendations.

Four of the recommendations for process changes, if effected, will have major beneficial effects on the outrageous waiting times now experienced by applicants. They should also improve the quality of decision making. The four recommendations are: single point of contact and initial decision making; elimination of the reconsideration step; establishment of an "adjudicating officer"; and direct appeal to the courts from an ALJ decision.

We are greatly concerned; however, with the proposal to redefine childhood disability seemingly back to what it was before the Zebley decision. As well, is the process redesign team not concerned with the fact that the National Academy of Social Insurance is carrying out a three year study on the definition of disability?

One of the most positive and helpful policy recommendations is the recommendation to use the \$500 per month earnings limitation for determining Substantial Gainful Activity (SGA) for people who are disabled (not blind). This should eliminate a lot of effort for SSA in trying to determine that people are engaging in SGA on lesser earnings, and in many cases removing disabled people from the rolls when their earnings do not represent a real ability to work.

We believe and recommend that the earnings level for Substantial Gainful Activity for all disabled people should be the same on for those over age 65, with the dollar offset over and above the base amount. In an age when any jobs for disabled and aged people are difficult to find in any event, an earnings level such as now used is no incentive to work. The change should be statutory and indexed for cost of living increases.

Some of the questions that arise after reading the proposed redesign are:

- (a) What happens to the current system of disability decision making? Will the state agencies continue to exist and if so, in what fashion? What will they do?
- (b) Will the claims manager be a state agency employee or an employer of SSA? What are the lines of supervision for the "claims manager" and the "adjudicating officer"?
- (c) Currently the Social Security Act (Sec. 221) states that the state agencies are to make determinations of disability unless they are unable to do so and SSA assumes the responsibility. Does the creation of a "claims manager" take the function away from the states--and doesn't that require a statutory change, unless SSA declares that all states have failed?
- (d) Who will handle the tremendous backlog that (probably) will exist when the claims managers become functional?
- (e) Who will handle continuing disability reviews (CDR's)?

(f) The attempt to relate "disability" to the accommodations required under the ADA does not appear to be feasible since the type of business, location, degree of need, and cost factor play a part in required accommodations. Two people with the same type of disability may require different accommodations, depending upon the job, location and ability of the employees to provide accommodations.

The proposal recognizes that many of the policy recommendations and definitions will require statutory and regulatory changes. In view of that, and the fact that process changes will require a long time to implement, the backlog of claims and appeals cases are not likely to diminish. Also, if disability is redefined, more than Sec.223(d)(5)(B) will need amendments.

It is our sincere hope and recommendation that staffing be increased immediately to alleviate the current situation, and to prepare for any implementation

STATEMENT OF JOHN N. STURDIVANT
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

I have specific proposals to suggest, but in general, the redesign has to be done in an environment of explicit commitment on the part of SSA to invest in both the human resources and the technological resources which are at the heart of the reengineering proposal. The streamlined process envisioned in the proposal will depend for its success on SSA having in place the latest computer technology and related equipment, and a staff which is adequately trained to realize the maximum potential of that technology. The National Performance Review recognizes, correctly in my view, that training workers is an investment that permits federal agencies like the Social Security Administration to fully exploit new technologies and to continuously improve work processes such as the SSA disability process. It is vital that SSA commit to a continual upgrading of this technology and to train all employees to handle the new technology effectively. Customer service cannot be improved by technology alone. Investments in human resources will pay off in terms of efficiency, improved customer service, and job satisfaction and morale. In the past, all system redesigns have not been supported by adequate training for employees to meet the demands of the future. Continuous training of these employees is essential or reengineering will fail at its most important goal, improved customer service.

Before presenting specific suggestions, in candor I must express specific concerns and disagreements with the internal validity of the SSA redesign proposal.

1. It seeks to produce uniformly high quality of processing, yet also *reduces* the methods currently used to monitor and increase quality: national quality checks, in-line quality processes, and pre-effectuation reviews.
2. It seeks a "user friendly" system, but also increases adversary customer relations by removing assistance that is currently provided to claimants in "developing the claim," that is, in obtaining necessary documents and completing necessary forms.
3. Its streamlining thrust is to eliminate the Appeals Council Review to reduce overall processing time, but that creates red tape and increases end-point processing timeframes by increasing dispute resolution burdens on courts and applicants themselves. Careful study should precede adopting a change that will give applicants only the more expensive and time-consuming option of a court suit to obtain review of an administrative law judge decisions.
4. Given current staffing and workloads, the assumptions of the re-design for improved processing time are unrealistic and not supported.
5. The proposal seeks improved quality results, but opens up more potential for abuse and fraud through increased third-party involvement and electronic claims filing.
6. The Plan makes assumptions that doctors, nursing homes, insurers, etc. will cooperate in taking on expanded roles which entail significant additional time and responsibility. Yet, those providers complain now about being overburdened by paperwork, and don't have buy-in to the new system. Where there does exist an incentive to assume the new role, many large, for-profit institutions may not be equipped to resist the inherent conflict of interest of helping the applicant become entitled to disability benefits, regardless of actual qualification, in order for the institution to receive payments for services covered by Medicare.

A related issue is whether applicants for disability benefits should be required, or should even need, outside help in collecting information to complete their claims. AFGE does not believe so because we would expect that the new process would be simple, accessible and responsive enough so that the role of third parties would be reduced, rather than expanded. Our experience is that claimants view the need to hire third parties to assist them through the disability process as what is wrong with the existing system. Applicants for disability should not have to resort to hiring a representative at their own expense to file a claim under the new system.

7. The Plan calls for computers to make presumptive decisions in lieu of a substantive decision maker. This is a risk-assessment approach that determines disability according to probabilities and likelihoods among supposedly comparable disability claimants. It is not user friendly to base a disability decision on what is, de facto, a new functional definition of disability as determined by a computer that cannot take individual circumstances into account. Systems enhancement should not replace the decision making role of the SSA employee.
8. The agency suggests that systems enhancements will decrease *overall* processing time, but employees predict that "on screen" disability claims intake will double the amount of time required to complete each disability application. This will tend to bottle up claims at the intake point, a problem that apparently has not yet been addressed.
9. Systems enhancements which don't include ergonomic considerations may lead to increased employee disabilities and produce another negative impact on their ability to meet processing time goals.
10. The proposed process encourages less "developmental time" assistance of claimants by SSA employees; this does not support customer service and is not user friendly.
11. Finally, the Administration's proposal is alleged to empower employees. But both the requirement to certify that training was adequate to allow correct disability determinations and the management information system's 100% computer scrutiny of work do not empower employees; rather, they are coercive and further increase employee stress. They are also potentially punitive to employees.

III. Recommendations to Improve the Disability Processing Plan

Our concerns can be accommodated within the underlying objectives and many of the elements of SSA's redesign proposal. In fact, we would like to present our comments in the form of strong recommendations about how the new process should be implemented in a more optimal manner.

1. With respect to job scope and content, SSA employees should make initial level disability decisions, as the Plan calls for. However, we submit that the combined roles of adjudicating both the disability component and the components of the means testing law (Title XVI) or the earned benefit law (Title II) cannot be done by one person. Where erosion of work exists in a process center, with the advent of the new technology it should be possible to relocate work, and not people, both to structure individual positions to succeed and to achieve balanced distributions of work and staffing concentrations.
2. As I have indicated, AFGE agrees that a pre-denial conference is user friendly in providing the claimant the option of whether to meet face-to-face, to wait on the phone, or to use another means. However, we strongly recommend that employees be protected by adequate health and safety measures when the applicant chooses to be told face-to-face that he or she does not meet the disability requirements of the law. In this regard, we have repeatedly called attention to the current problems caused by having workers exposed to angry claimants, or those with contagious conditions like tuberculosis, or with mental impairments. These problems, which are documented in reported incidents and in the media, have even greater potential for threatening employees' health and safety under the expanded disability role for employees that the Plan describes.
3. The Plan's description of an adjudication officer position rightly envisions a user friendly relationship with the disability applicant. To promote that objective, we recommend that the position not require an attorney because the current disability application process would become even more legalistic, and thus less user friendly, than it is now.

4. Consistent with the Plan, we believe that the Appeals Council Review function should continue to be a prerequisite for seeking judicial review. However, we recommend that the Council be limited to reversing or sustaining the Administrative Law Judge (ALJ) decision.
5. Because proposed changes are so extensive and have historic implications for disabled workers, to invest everything in any new Plan without substantial evidence that it will work acceptably as an integrated whole is not prudent. AFGE believes implementation should be on an experimental basis before resources are spent on nationwide implementation. We recommend that the system be tried in several regions, and the results analyzed so that SSA can be certain the newly designed system is superior to the one it replaces. Such a pilot project of the entire disability processing system to verify that the assumptions made about the design of the system are correct will, itself, make the disability process more user friendly. We also recommend at least a 25% national random sample review to insure integrity of the system and that SSA continue using current methods to monitor and increase quality. These are national quality checks, in-line quality processes, and pre-effectuation reviews.
6. Electronic filing should be delayed until technological improvements are available that will secure the system against fraudulent filings.
7. The disability determination service (DDS) should be brought into and become part of the SSA. A waiver should be sought so that any such employees will not count against SSA's Full-Time Equivalent positions (FTEs). If the employees are transferred from a state which provides them higher pay and benefits, they should not suffer any losses as a result of the transfer to SSA.
8. Well-planned reengineering will enhance public service. However, staffing deficits must still be eliminated. Failure to provide sufficient workers will result in a collapse of the reengineering and deterioration of the SSA program.

IV. Conclusion

Part of the reason AFGE recommends modifications to the Plan, such as through demonstration projects to test its design on a manageable scale, is because our experience in SSA and elsewhere has taught us to be cautious about notions of new technology as the panacea for fundamental problems like inadequate staffing levels. As the reengineering team reported in its proposal, the public wants and should have more human contact with representatives of SSA; the combination of new technology and an adequate complement of trained staff is preferable to skimping on the human side of technological advancements in the disability program.

No group has more intimate knowledge than do its workers of the problems SSA has faced because of increased workloads and reduced resources. In the last decade, the many benefit programs SSA operates have grown by 70% percent, while staffing levels have not only failed to keep pace, but have declined by one-fifth. The productivity of SSA workers has grown and compares favorably with that of many of our nation's most profitable private sector firms. SSA workers have a strong desire to provide the high quality customer service the public deserves. With the proper investment in human resources and technology, SSA workers look forward to being able to provide their fellow citizens with quick and efficient service.

We are confident that implementation of a better version of the plan proposed by the SSA disability reengineering team will allow us to do just that. Finally, AFGE wants this effort to be successful and we want to be a part of that success. We feel that we are eminently qualified to sit at the decision-making table with Congress and this administration.

STATEMENT OF THE AMERICAN PHYSICAL THERAPY ASSOCIATION

Mr Chairman, Members of the Committee, thank you for providing the American Physical Therapy Association (APTA) the opportunity to submit this statement on restructuring the Social Security Administration's Disability Determination Process. The APTA represents over 61,000 physical therapists, physical therapist assistants and students of physical therapy.

The need for reform of the Social Security Disability program is well documented. The APTA commends you and your subcommittee for examining ways to better serve those members of society with disabilities. The APTA also applauds the efforts of the Clinton Administration in its attempts to restructure the Social Security Administration's Disability Determination Process.

The backlog of disability applications awaiting action by the Social Security Administration has grown sharply in recent years, subjecting qualified claimants to long waits for benefits. The cause of this problem is two-fold. First, during the mid-1980s, the Reagan and Bush Administrations reduced SSA's staff by 21 percent. While these Administrations contended that SSA could compensate for the cuts with increased reliance on technology, automation of the agency's disability determination process has produced limited gains in efficiency to date. Second, applications for DI and SSI disability benefits have increased markedly since 1990. As a result of these two factors, SSA now confronts sharply increased disability claims with neither the technology nor staff resources required to provide timely service. Appropriate changes need to be made.

APTA believes that one reason for the backlog in claims relates to the requirements for evaluating individuals who submit disability claims.

Section 223 (d) of the Social Security Act currently requires that a claimant have a medically determinable physical or mental impairment to be found disabled. A physical or mental impairment is defined in that section as an impairment that results from anatomical, physiological, or psychological abnormalities that are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. Section 404.1513(a) of SSA regulations list "acceptable sources" of evidence for disability evaluations as licensed physicians, osteopaths, psychologists (and optometrists only for measurement of visual acuity and fields). Subpart (e) allows consideration of medical information from other sources including physical therapists. The SSA does request and pay a "reasonable fee" for existing evidence from a physical therapist treating a claimant.

Should existing evidence from a claimant's own medical sources be insufficient to render a disability determination, then the SSA through State disability determination services (DDSS) will obtain the necessary information. SSA policy is that the treating physician responsible for the claimant's overall health care is the preferred source in the case where a complete consultative examination is needed. If the only additional evidence needed is testing, such as range of motion tests, manual muscle testing, or gait evaluation with prosthetic or adaptive devices, then SSA permits the DDSSs to purchase such specific testing from a physical therapist who is licensed, and a member of the APTA.

The Proposal from the SSA Disability Process Reengineering Team states under the Disability Decision methodology Step 2 - Medically Determinable Impairment:

"Under the new approach, SSA will consider whether a claimant has a medically determinable impairment, but will not longer impose a threshold severity requirement. Rather, the threshold inquiry will be whether the claimant has a medically determinable physical or mental impairment that can be demonstrated by acceptable clinical and laboratory diagnostic techniques. SSA will continue to evaluate the existence of a medically determinable impairment based on a weighing of all evidence that is collected, recognizing that neither symptoms nor opinions of treating physicians alone will support a finding of disability. Depending on the nature of a claimant's alleged impairments SSA will consider the extent to which medical personnel other than physician can provide evidence of a medically determinable impairment."

When the SSA considers the extent to which medical personnel other than physicians can provide evidence of a medically determinable impairment, licensed physical therapist must be considered. Licensed physical therapists should also be added to the definition of "acceptable sources" for evaluation of a physical impairment, found in Section 404.1513(a). Shifting physical therapists from the supplemental category (Subpart(e)) to an "acceptable source" would expand the role of the physical therapist beyond limited testing and allow them to perform initial evaluations for physical impairments such as muscular-skeletal limitations in the disability determination process.

Physical therapists are licensed and qualified to evaluate the severity of their patient's disabilities. Thirty states currently permit health care consumers to receive care from a licensed physical therapist

without obtaining a physician's referral. Additionally, Medicare regulations cover a licensed physical therapist's assessment and periodic reassessment of a beneficiary's rehabilitation needs and development of a physical therapy program.

The Disability Process Redesign also states under Evidentiary Development that "SSA's ability to provide timely and accurate disability decisions depends to a significant degree on the quality of medical evidence it can obtain and the speed with which it can obtain it." And it further states the "SSA will develop, in conjunction with the appropriate health care professionals and other public and private disability programs, standardized criteria which can be used to measure, as accurately and objectively as possible, an individual's functional ability." Increasing the number of acceptable health care providers would be beneficial to claimants with physical impairments, particularly for those in rural areas where a trip to a health care provider can be problematic. Any criteria which can be used to measure, as accurately and objectively as possible, an individual's functional ability must utilize those health care professionals who are qualified and trained in this area, such as physical therapists.

The current situation of waiting time poses a severe threat, particularly to those seriously disabled. Putting a stroke victim or a quadriplegic accident victim through a long waiting period must be stopped. Permitting physical therapists to perform the evaluations for physical impairments will save the Social Security Administration time and greatly benefit those who are served by it.

STATEMENT OF RUSS NEWMAN, PH.D., J.D.
EXECUTIVE DIRECTOR FOR PROFESSIONAL PRACTICE
AMERICAN PSYCHOLOGICAL ASSOCIATION

The American Psychological Association (APA) is pleased to have this opportunity to provide testimony to the House Ways and Means Subcommittee on Social Security concerning the March 1994 proposal of the Social Security Administration's (SSA) Reengineering Team to restructure the disability determination process. APA is the professional organization representing over 124,000 members and affiliates engaged in the practice, research and teaching of psychology.

APA's input was solicited by the Reengineering Team during the course of its investigation. In response, APA recommended several changes. Unfortunately, none of APA's recommendations were incorporated in the Reengineering Team's proposal. We believe that SSA's endorsement of these recommendations is critical if SSA is to achieve its stated goals. Therefore, we are hopeful that the Subcommittee will encourage SSA to incorporate the following recommendations in its reengineering initiative:

* Revise proposed regulations which sharply curtail the use of psychological assessment in the disability determination process.

* Eradicate ALJ bias against claimants with mental impairments by prohibiting inappropriate ALJ demands for and use of raw test data; providing ongoing education concerning the role of psychologists and the use of psychological assessment in the disability determination process; and sensitizing ALJs and other SSA staff to the needs and vulnerabilities of persons with mental impairments.

* Defer to the professional expertise of the consulting psychologists concerning the choice of psychological assessment tools to be utilized in any particular case.

Moreover, after reviewing the proposal we are also concerned about its recommendation to expand the role of the disability determination specialist by permitting that individual to unilaterally make an initial decision concerning disability without the input of appropriate medical consultants.¹

The basis for these concerns is as follows:

I. Proposed Regulations

Current regulations that relate to the documentation of mental disorders in the disability determination process clearly endorse the use of psychological assessment and recognize the value of this important diagnostic tool. Unfortunately, proposed rules published in July, 1991 (56 F.R. 33130) sharply curtail the use of psychological assessment, with no explanation or rationale for such restriction. If implemented, we believe that the proposed rules would seriously compromise the integrity of the disability determination process, to the grave detriment of the people it is designed to serve and to the public at large.

¹ Due to time constraints, this testimony will be limited to APA's analysis of the SSA reengineering proposal only to the extent that it impacts on the role of psychologists in the disability determination process. However, we are aware of the serious concerns voiced by numerous disability advocacy organizations regarding the likely adverse effects to claimants if the proposal's recommended changes to the substantive disability standard are ultimately adopted. Therefore, in our comments to SSA we will undertake a more extensive analysis of the proposal to determine the effect on claimants who allege disability based upon mental impairment.

Although APA, disability advocacy organizations, several members of Congress, and hundreds of concerned citizens, have communicated these concerns to SSA officials, SSA's response has been guarded, and to date SSA's position remains unclear.

APA's concerns relate specifically to the SSA's proposed treatment of psychological assessment in the disability determination process. Section 12.00(D) of the SSA Listings² details the manner in which mental disorders must be documented for disability determination purposes. We believe that the promulgation of these proposed rules would establish a dangerous precedent that would threaten the wellbeing of thousands of disabled Americans, encourage fraud and abuse within the system, and dramatically increase costs.

The rules' de-emphasis on psychological assessment in favor of self-report, family report, and reports from treating sources is ill-advised, since these methods are frequently unreliable and will rarely provide sufficient documentation of mental disability. However, psychological assessment has long been considered to be an extremely valid and objective means of determining mental impairment. In fact, neuropsychological assessment is frequently the only way to diagnose certain types of organic mental impairments.

Under the proposed rules, psychological assessment can only be used as a last resort, "reserved for those situations in which the required documentation of mental impairment cannot be obtained from other sources." 56 F.R. 33138. Certain types of tests have been virtually eliminated as acceptable sources of evidence, despite widespread acceptance of valid applications. Indeed, the use of all psychological tests has been sharply curtailed, with no clear explanation or rationale for such restriction.

Our most serious concern is that applicants for disability benefits who meet the requisite eligibility criteria will be unable to prove their disability without the evidence that psychological assessment provides. We believe that this will result in tragic consequences for many such individuals, tantamount to the 1982 fiasco when thousands of mentally impaired individuals were dropped from the SSDI rolls, leading to many documented suicides and early deaths.

Ironically, we believe that SSA's proposed rules, if implemented, will make it easier for able-bodied individuals to obtain eligibility for disability benefits. Psychological assessment is a useful tool in revealing mental impairments as well as evidence of malingering, confusion, and exaggeration. The dramatically reduced use of psychological assessment and the increased reliance on self report favored by the proposed rules would make the system much more vulnerable to fraud and abuse, resulting in increased costs to taxpayers.

We also envision additional administrative costs resulting from extensive utilization of the appeals process. This would be the inevitable outcome of the anticipated increase in denials of truly disabled individuals who, lacking psychological assessment results, would be unable to provide the requisite evidence necessary to satisfy strict eligibility requirements.

Revisions to the proposed rules that address the concerns stated above would clearly enhance the entire disability determination process by promoting accuracy and efficiency in making disability determinations. They would also promote SSA's stated goal of streamlining the entire process by limiting the necessity of time-consuming and costly appeals. Since the disability evidence collection process has been identified as a key area for consideration in the reengineering initiative, we believe that modifications to the proposed rules are critical if SSA is to

² 20 CFR, Chapter III, Part 404, Subpart P, Appendix 1, Section 12.00(D).

achieve its stated goal.

II. ALJ Bias

Over the past few years, overt instances of SSA ALJ bias against applicants for disability benefits have been alleged. In fact, in September 1992 a senate subcommittee hearing was convened to address SSA's response to allegations of racial bias. The hearing was prompted in part by a GAO report that showed an unexplained pattern of racial disparities in ALJ decisions. Several federal court cases alleging "general bias" by ALJs have also been filed.³

APA has encountered numerous instances of bias by ALJs against one discrete class of claimants: specifically, persons alleging disability based on mental impairments. This bias appears to be widespread and is most clearly manifested by ALJ treatment of psychologists and psychological assessment. However, while psychologists and the reports that they produce are the direct targets of this bias, the ultimate victims of such bias are the claimants themselves.

APA has investigated numerous instances of bias and has attempted to remedy the resulting problems, with varying degrees of success. However, we firmly believe that the problems that we have identified could be eradicated by SSA if systematic efforts were undertaken to do so. We believe that SSA should initiate efforts to remedy the following problems on a national level:

A) Inappropriate demands for and use of raw test data by ALJs

We have been apprised of the practice of certain ALJs in Chicago who demand access to individual test responses from psychological tests whenever reports are prepared by psychologists on behalf of claimants who allege disability based on mental impairment. Production of such data has been demanded in spite of protestations by psychologists that such action would violate state confidentiality statutes as well as professional ethical standards and current reasonable standards of practice. The disclosure of test protocols also violates standardized test practices by reducing the validity and reliability of future uses of these tests.

The disclosure of individual test responses from the claimant's psychological evaluation is not required by the Social Security Act or SSA regulations. Therefore, this is not a situation where federal law conflicts with state law.

We are particularly concerned by this practice since a psychologist's expertise is critical to achieve accuracy in the scoring and interpretation of individual test responses. An untrained individual cannot possibly draw the appropriate conclusions from such data. This would be tantamount to allowing a non-physician to interpret comprehensive blood test results or a diagnostic X-ray. Clearly, the scoring and interpretation of psychological tests is a complex endeavor that should only be performed by licensed psychologists, who receive intensive training in this process.

We have also learned that in certain cases where ALJ access to the data has been denied by the psychologist who evaluated the claimant, the reports have been struck from the record, in violation of due process and despite the fact that they constitute compelling and reliable medical evidence that may be crucial to a determination of disability. These practices have been perpetuated for several years.

³ See United States Senate, Committee on Government Affairs, Subcommittee on Oversight of Government Management, Hearing on Allegations of Bias Within the Social Security Disability Program, September 22, 1992.

Some judges have also threatened to use claimants' responses to individual test questions to impeach the credibility of the claimant. The misuse of such data for impeachment purposes would be irresponsible if not unconstitutional because it would preclude the fair and impartial review and consideration of the facts. Furthermore, it is an entirely inappropriate and inaccurate method for determining whether a claimant is telling the truth. While we appreciate the need for the judge to evaluate the claimant's credibility, the use of individual test responses for impeachment purposes is not the way to accomplish this. Although certain tests include indices that can be helpful in determining whether an individual is attempting to fabricate or falsify responses, the manner in which the tests measure such behaviors has nothing to do with the way in which each individual question is answered. Rather, "malingering" is determined by analyzing clusters of answers to questions that have been designed to elicit the same type of responses.

APA is understandably alarmed by these practices for several reasons. Psychological assessment plays a critical and unique role in the disability determination process. These practices undermine that role by the inappropriate, inaccurate, and misguided intentions for use of such data in certain cases, and the cavalier refusal to consider compelling medical evidence in other cases. The practices also raise serious legal and ethical questions regarding client confidentiality.

While we recognize the importance of granting administrative law judges wide latitude to fully develop the record in a manner that facilitates a reasoned and informed determination of disability, we are concerned by what we consider to be an abuse of authority and an inability or refusal on the part of certain judges to appreciate the limits of their professional expertise. We believe that other methods exist to fully and fairly develop the record and evaluate the evidence presented by the claimant.

Since the disability evidence collection process has been earmarked as a key area for consideration in the disability reengineering initiative, we believe that SSA should take whatever steps are necessary to ensure that the objectionable practices detailed above are eliminated. We believe that the correction of these problems would clearly enhance the disability application process, since the current practices create unnecessary delays while also undermining a claimant's ability to receive a full and fair adjudication.

B) Continuing education of ALJs

In 1992, APA learned that ALJs in New York State had actively discouraged state agency caseworkers from referring claimants alleging disability based on mental impairment to psychologists for psychological consultations unless intellectual assessment was indicated, despite the fact that most claimants alleging disability based on mental impairment suffer from emotional problems. It became apparent that this instance of ALJ bias stemmed in part from reliance on the proposed regulations referenced in section #1 of this testimony.

The SSA was ultimately quite responsive to APA's concerns in this regard and was receptive to our initiative to educate all ALJs in Region II concerning the role of psychologists in the disability determination process. Mandatory workshops led by APA members in accordance with an APA training protocol that was pre-approved by SSA were held in various locations in New York State and New Jersey in early 1993.

APA believes that this cooperative effort with SSA was a very encouraging step toward eliminating the bias that psychologists have encountered. However, we believe that further efforts are necessary to insure that all ALJs nationwide receive continuing education in this regard.

Other instances of bias based on misinformation have also come to

our attention. For example, in late 1993 one of our members apprised us that an ALJ had instructed the state agency to contract exclusively with psychiatrists in cases where a mental status consultative exam was needed to assist the judge in evaluating claims for disability benefits based on mental impairment. Compliance with such a request would clearly violate applicable SSA regulations pertaining to the use of psychologists in the disability determination process, for the following reasons.

First, psychologists and psychiatrists are both considered to be equally qualified medical sources whose reports constitute medical evidence to be evaluated in the disability determination process at every level of administrative review.⁴ In fact, psychologists serve both as consulting examiners as well as medical advisers to ALJs in adjudicated hearings. Moreover, ALJs are required to accept as evidence "any documents that are material to the issues at hand", and this regulation does not contain any preference for psychiatrists' reports over psychologists' reports.⁵ Finally, the professional specialty of the consultant who prepares a report is not considered to be a relevant factor in determining the adequacy of the report.⁶

We believe that SSA must take decisive action to educate all ALJs to eliminate the widespread misperceptions that currently exist concerning the role of psychologists in the disability determination process.

Clearly, the problem of ALJ bias against psychologists continues to be troubling to APA. While the SSA has been responsive to some of the specific instances of bias that APA has identified, we fear that these practices are quite pervasive and cannot be effectively resolved on a piecemeal basis. As Senator Carl Levin so aptly stated, the consequences of ALJ bias "remain significant because of the large number of cases each ALJ handles, the importance of the ALJ's decision to the quality of life of the beneficiary, and the hardship that is incurred in trying to challenge an act of bias on a case by case basis."⁷

We believe that SSA must take decisive action on a national level to eliminate the offensive and illegal practices that we have identified.

III. Deference to the consulting psychologist's expertise

APA has been apprised of numerous instances where a consulting psychologist's professional expertise has been thwarted by the state agency. We believe that these actions compromise the integrity of the entire disability determination process, to the detriment of the claimant and the public alike.

For example, state agencies may dictate which test or tests can be utilized by a consulting psychologist in evaluating a claimant. One psychologist was instructed to use specific nonverbal tests when evaluating the intelligence of non-English speaking claimants. Neither of these tests were adequate to measure general intelligence. In fact, the tests specified by the state agency did not sample important cognitive functions relating to verbal

⁴ 20 CFR Sections 416.903(e), 416.912(b)(6), 416.913(a)(1) and (3), 416.919(g), 416.1016.

⁵ 20 CFR Section 416.1444.

⁶ 20 CFR Section 416.919(p).

⁷ Opening Statement of Senator Carl Levin, Chairman, Subcommittee on Oversight of Government Management, Committee on Government Affairs, September 22, 1992 Hearing on Allegations of Bias Within the Social Security Disability Program.

expression, comprehension, and conceptualization.

It would be inappropriate for any disability examiner to draw conclusions about a claimant's ability to engage in substantial gainful activity without knowledge of these important functions. In doing so, they might fail to acknowledge the existence of a developmental language disability. Conversely, a claimant with intact verbal skills but with specific deficits in visual perception and/or motor execution might be inaccurately diagnosed as retarded, although such individual may have ample employment-related skills in the verbal and social domain.

This same psychologist was also instructed to evaluate organically based declines in cognitive functioning using specific tests that he considered inadequate and/or impractical to establish organic cognitive dysfunction.

APA believes that deference to the professional expertise of the consulting psychologist concerning the choice of psychological assessment tools to be utilized in any particular case represents the most effective way to achieve a comprehensive and reliable determination of disability.

A related problem is that psychologists who perform consultative services for state agencies are not always free to alter the length or content of their examination without spending unpaid clinical time, and they are expected to answer numerous important questions, both general and specific. Comprehensive psychological assessment requires flexibility, clinical judgement, and increased clinical time and expense. It is inappropriate and ultimately cost-ineffective to impose rigid limits on this process.

Other problems exist. For example, communications from state agencies to consulting psychologists are often unclear as to the nature of the examination being requested. Furthermore, in cases where a child is being evaluated, one psychologist reports being thwarted by the state agency in his efforts to learn whether the child had been previously evaluated in the school setting and the outcome of such evaluations, because of stated time pressures cited by the state agency. This policy has persisted despite the fact that the review of prior evaluations is considered to be standard clinical practice.

Since consulting psychologists perform a vital function in enabling SSA to determine disability based on mental impairment, we believe that deference to their professional expertise is critical if SSA is to achieve its stated goals.

IV. Proposed Role of Disability Claim Manager

The proposal of the SSA Reengineering team envisions an expanded role for the disability claim manager. The proposal recommends that this individual be responsible for making the initial determination of disability, with technical support from medical consultants for expert advice and opinion if necessary.

This constitutes a significant departure from current practice, where a disability specialist and in-house medical consultant together make initial determinations of disability.

We believe that the disability claim manager should not have the discretion to independently deny a claim for disability benefits. Rather, in cases where the disability claim manager advises that a decision of denial be issued, the decision should be supported by the opinion of an appropriate in-house medical consultant.

We are pleased to have had the opportunity to submit this testimony to the House Ways and Means Subcommittee on Social Security. We are hopeful that the Subcommittee will take an active role in encouraging SSA to incorporate these recommendations in its Reengineering Initiative.

STATEMENT OF FRANK ARIA
Quality Assurance Specialist, New Jersey DDS

Mr. Chairman and Members of the Subcommittee:

The press release for the present hearing provides a convenient starting point for evaluating the Disability Process Redesign proposal from the SSA Reengineering Team. The press release notes that the backlog of disability applications and attendant delays stem from a combination of staff reductions in the face of increased filings for benefits and the failure of technology to bridge the resultant productivity gap.

Although certain elements of the proposal are truly radical, the philosophy seems familiar: we can provide faster service, even while using fewer employees, but with more and better machines. In my view, the proposal has three major problem areas: the necessity to automate virtually the entire disability claims process, the need to conduct extensive personal interviews in unprecedented numbers at the initial claims level, and the requirement to determine eligibility for benefits using sharply curtailed levels of medical evidence, generally without the assistance of a physician or psychologist. Let us examine these problem areas in greater detail.

Problems with Automation

The proposal identifies automation as the key prerequisite for implementation of the entire reengineered disability claims process. It is only through the use of a fully integrated electronic system that the new Disability Claims Manager can perform "the total job," including: (1) gathering claims application information; (2) developing evidence for both the disability and non-disability eligibility factors; (3) communicating with specialized "team" members for technical and medical support; (4) analyzing medical evidence, including a new series of "functional assessment instruments"; (5) conducting personalized interviews with claimants on a "triage" basis where only "impairment-specific" questions are used; (6) preparing lengthy "statement of the claim" decisions which explain both the disability and non-disability issues involved; (7) producing extensive personalized notices of the decision; and (8) effectuating payment whether an allowance is made at the initial level or later at an appeal level. Additionally, this integrated system is to provide for case assignment and control, appointment scheduling, fiscal and accounting support, quality assurance functions, and management information capabilities. The whole process stands or falls on the effectiveness of the new information technology.

In evaluating the proposal, it should be noted that a number of the above functions have already been automated at State DDS's over the past decade. The results, however, have not been optimal. Drawbacks include too much direct keying, duplicate keying, and having to negotiate too many screens to accomplish a single task. As noted in the Subcommittee press release, automation has not produced the anticipated dramatic productivity gains. Of further concern is the testimony given last year by the President of the National Council of Social Security Field Office Locals, which details "systems manipulation" and cheating schemes involving a variety of automated tasks at federal local offices. The pressure to reduce service to statistics-- inflated ones at that-- has been intense.

Problems with Intake and Pre-Denial Interviews

The proposal envisions "early, ongoing dialogue" with nearly all claimants. Under the new disability process, in most cases a series of interviews are to take place at the initial step: a preliminary inquiry discussion, an application interview, and, if chosen by the claimant, a pre-denial interview. A lengthy list of topics is to be discussed, ranging from a detailed explanation of all major aspects of the program, to coverage of a dozen or more complex issues involving case-specific medical and non-medical factors, including their relevance to each family member. While taking brief notice of some difficulties, such as language barriers and mental incompetency, interviewing is assumed to be a rather routine, straightforward exercise for both the claimant and the interviewer. The proposal foresees smooth, expeditious conversations, facilitated by a customized "developmental expert system application."

This picture is incompatible with much of the experience gained from past personal interview studies, demonstration projects, and pilots conducted by SSA since the 1960's. Determining whether a particular applicant is physically or mentally unable to engage in full-time employment is considerably more involved than, say, determining whether someone is entitled to retirement benefits or unemployment checks. In those cases, for the most part, the data does the talking. For disability, however, there is no data equivalent for, say, a birth certificate, which would tell the evaluator the true medical nature and severity of a pain in the chest or feelings of anxiety. Most people cling to their own highly personalized definition of the term "disability," especially as applied to their own bodies and minds, and this places major obstacles in the path of any interviewer following a systems-driven script. Personal experience in this area has shown that, in addition to language barriers and incompetency, other obstacles may include one or more of the following:

- * Despite efforts to control the time and subject matter,

disability interviews are, by nature, highly individualized, subjective, and free-form, given the freedom of any applicant to express his problems as he deems fit. A great majority of people in this situation will allege more than one serious condition; four or five major allegations are seen often. The length of these dialogues is, therefore, quite unpredictable. A large number are likely to involve a degree of tangential talk, given the need to remain courteous while people with problems have their say. There is no "average" interview time because there is no "average" disability claim. You can process thousands of cases and the next one could very well present a particular set of medical circumstances not seen before.

* Any pre-denial disability interview carries a high potential for shifting the adjudicative focus away from the established record of objective evidence toward the more subjective grounds of negotiating over symptom statements which are often imprecise, unverifiable, conflictive, or apparently inaccurate when compared to the accumulated probative medical documentation on file. This places an unwelcome burden on the interviewer to keep the applicant relationship non-adversarial. Applicants who will agree that, yes, their cases were finally too weak, and they are not, after all, deserving of benefit checks, are very rare indeed. Far more common are those who will become upset, or worse, at the point during any personal interview when the perception takes hold that the final decision will be a denial.

* These obstacles are likely to be magnified under the pressure of mounting case backlogs. Current workload projections for fiscal year 1995 call for substantial increases in pending caseloads. Given the prevailing rejection rate at the initial step, the demand for pre-denial interviews would likely be very great. Under these circumstances, the proposal to handle an increased number of claims while initiating a higher level of personal service, including multiple personal interviews, appears to be unrealistic given the lack of any increase in staff. A likely outcome would be that this assignment of interviewing would seriously undermine the decision-maker's ability to schedule a normal workday or effectively manage even a modest caseload.

Problems with Determining Eligibility for Benefits

For the nearly four decades of the disability program's existence, the adjudicative process has been built on a strong medical foundation. The unchanging definition of disability has always included language establishing a firm cause and effect relationship between severe physical or mental impairments and the long-term inability to work. This medical basis for determining eligibility is demonstrated by the following features:

* The medical evaluation criteria, or Listing of Impairments,

consists of highly specific symptoms, signs, and laboratory findings, as well as key concepts and descriptions of the medical evidence needed to evaluate impairments under more than a dozen body systems.

* Sufficient medical evidence, in detail, is sought to insure the consistent application of the above objective criteria in every case.

* A program physician or psychologist actively participates, or expressly concurs, in making each determination of eligibility for benefits as part of a lay examiner/ physician team.

The most serious drawback of the whole proposed redesign process is that it effectively destroys this medical foundation. The proposed changes can be summarized by focusing on a few key issues: first, what would constitute acceptable medical evidence; secondly, how would that evidence be evaluated; and finally, who would make the initial level decision?

The collection of detailed medical evidence, according to the proposal, largely accounts for recent processing time delays. Under the new process, therefore, "certifications" will be acceptable replacements for all but "core" medical data, howsoever that term may eventually be defined, along with the submission of some standard medical diagnosis. However, through the years, such unsubstantiated statements have very often proven to be unreliable in a high number of claims. Adjudicators could cite any number of cases where a treating source made statements that later proved inaccurate once medical development was completed. This single radical departure from time-tested documentation practices would destroy the reliability of a large number of decisions made under the program. There would simply be insufficient proof that an individual either met or did not meet the statutory definition of disability.

Under the proposal, the decision-making process would undergo the following radical changes:

* Decisions would be based primarily on "function" rather than on detailed medical findings describing the nature and severity of the impairments. The proposal thus glosses over the fact that functional assessments have been an integral part of the current process for decades, and have proven to be far more arbitrary than strictly medically-based criteria.

* The proposed universally accepted "functional assessment instruments" for evaluating adults, children down to birth and also work activity, once they exist, would, unlike those used today, have little medical basis beyond the opinions of the sources offering them as evidence. If the past is any guide, many such assessments would be filled out in a pro forma way.

Today such forms must be backed up with clinical details. Tomorrow, they may largely stand on their own, their conjectural conclusions becoming the key element in determining eligibility status.

It would appear that the use of scaled back evidence and replacement certifications, in combination with check-box style "functional instruments" is intended, in part, to all but eliminate the role of the program physician or psychologist from the decision-making process. Under the proposed scenario, the physician's role fades to that of a standby consultant, to be called up on the system to answer the occasional question that might surface every now and again.

Conclusion

Implementation of the proposed decision-making process would likely serve to further destabilize the disability program at a time of increasing public participation. Eligibility decisions would be far more speculative than they are now, based, as they would be, on uncertain "interpretive data" in lieu of hard evidence, opinionated functional assessments, and the personal pleadings of the applicants. Such a development would extend the trend toward a loss of control over the beneficiary rolls begun in the mid 1980's when Continuing Disability Reviews (CDR's) were largely abandoned.

One final word of caution should be registered. New procedures such as these are rarely implemented without first assuring that the ways and means are available to virtually guarantee favorable performance statistics early on. Workload characteristics, locations, and staff sizes can be manipulated to produce whatever productivity, processing time, and accuracy profiles are desired. It should not be assumed that the inevitable impressive results of these first efforts herald success on a national scale.

North Arlington, NJ
April 24, 1994

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RE: Comments of the Disability Process
of the Re-engineering Team

Dear Committee Members:

If the intent of the Government is to make it significantly more difficult for a person to qualify for Social Security disability insurance benefits or Supplemental Security Income benefits it has been achieved through the provisions of this report.

I respectfully submit the following comments for your consideration in response to the Disability Process Redesign Report of the Social Security Administration Re-engineering Committee.

My practice is concentrated in the area of Social Security law (including SSI) and has been since 1983. I have represented more than one thousand claimants before the Social Security Administration and in appeals in district court.

The re-engineering report is long and complex, however, the end result of this report is that it changes the definition of disability and the impact of the changes is that it will become substantially more difficult for a person to fit the new definition of disability and many fewer people will qualify for benefits. Many people that qualify for benefits based on the current Social Security Act and Regulations will not qualify once these changes are in place.

The Re-engineering Committee addresses both procedural and substantive changes. The primary stated concern of the committee is the length of time it takes to process claims. This is certainly a valid concern and one shared among practitioners in this area also. However, it is unclear why it is necessary to alter not only the procedural and processing system but also to substantially change the adjudicative standard of the disability program, which seems to be working well, in order to speed the processing time of claims.

I applaud Social Security for proposing a streamlined administrative process, which does away with the reconsideration level. In the past few years this step has become a stamp of the initial denial, where no new evidence was obtained and few people were granted disability.

The bar is all for a streamlined administrative process but not at the expense of the claimant. The National Center for Administrative Justice published the results of its study of the Social Security Administration Hearing System in 1977. The group reported: "Our general conclusion, is that the more dramatic proposals for reform are inadvisable, either because they are not directed at real problems, because they would be on balance dysfunctional or because their effects are unknown."

"Public trust in the SSA scheme of social insurance would be significantly undermined were the opportunity for a face to face encounter with a demonstrably independent decision maker eliminated from the system." "Short of committing more resources, changes to speed the process would often, if not inevitably, risk lowering its quality."

The report in essence not only changes the definition of disability, but in an addendum suggests that independent Administrative Law Judges are not necessary and should be replaced with hearing officers who are employed by the SSA agency: The impartiality of the Administrative Procedure Act-protected administrative law judge is important to the fair adjudication of claims under the Social Security Act. Otherwise, whether a person was found to be disabled would be more easily influenced by the current administration.

In the introduction to the report the parameters of the committee's work are set out as follows:

"Every aspect of the process except the statutory definition of disability, individual benefit amounts, the use of administrative law judges as the presiding officer for administrative hearings and vocational rehabilitation for beneficiaries is within the scope of this re-engineering effort." (emphasis added) (Report p.2)

The definition of disability as set forth in the statute contains the following elements: 1. the inability to perform substantial gainful activity; 2. by reason of a medically determinable physical or mental impairment, 3. which has lasted or is expected to last 12 consecutive months or end in death; 4. taking into account the individual's age education and past work experience. 42 U.S.C. section 423(d)

The report, in fact, alters the statutory definition of disability by altering the basic standards by which disability is assessed. The statute specifically states that an individual's age, education and past work experience is to be considered in determining whether that person is disabled. The report completely ignores education and only considers age or past work experience for those in an as yet undefined category designated as "nearing retirement age." (Report p.43-44) Nearing retirement age could be as broad as 60 through 67 or as narrow as 66-67.

The report suggests the elimination of the medical criteria which SSA has always used to demonstrate prima facia disability (the listings) and medical vocational regulations (the Grid) which for the past fifteen years have determined the weight to be given age, education and past work history.

The report suggests replacing the listings with a different, less inclusive, but as of yet undefined "Index of Impairments". The Index will be less inclusive and would thus limit the number of claims which could automatically be granted. This would at best unnecessarily prolong the disability process for many individuals and would likely result eventually in more denials.

What is interesting is that the current standard used, the Listings of Impairments is periodically updated to conform with changes in medical advances. There is no evidence that the current listings of impairments does not work effectively. The Report's only problem with the current medical listings is that they are not easily understandable by lay people. (p.39) This is an absurd reason to get rid of a procedure that works well.

In the current five step process, the last issues which SSA evaluates to determine disability are whether a claimant can return to his or her past relevant work (work performed in the preceding 15 years), and if not, whether he or she can perform any other work in the national economy, taking into account his or her age, education and past work experience. Under the Re-engineering

Committee's proposed system, which has discarded virtually all consideration of age and past work experience (except as regards and undefined "nearing retirement" category) and absolutely all consideration of education, the sequential evaluation ends in a fourth step which purports to evaluate the ability to perform substantial gainful activity newly defined as "basic physical and mental demands of a baseline of work." (Report p.40-42)

Another important problem with the recommendations in the Report, is its suggestion to apply the Americans with Disabilities Act (ADA) to the adjudication of disability. In a June 2, 1993, a memorandum from Dan Skoler to Headquarters Executive Staff, he stated that "...the ADA and the disability provisions of the Social Security Act have different purposes, and have no direct application to one another." This is true. The ADA is an anti-discrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities by requiring employers to consider whether reasonable accommodations could remove such barriers to work. The purpose of Social Security is to provide an income replacement for those people unable to work in the competitive job market. The regulations specifically state that there must be a significant number of jobs that a person could perform. In the addendum to the Report there is the suggestion that claimants be required to establish that employers have made all the accommodations required under the Americans with Disabilities Act and to have a signed statement from their former employer which outlines the steps that have been taken to make reasonable accommodations for the disability. This is not only an unreasonable onus to put on the disabled worker but also an impossible burden of proof. As the way the law currently stands, if a person can prove that they are unable to perform their past relevant work the burden shifts to the government to show that there are other types of jobs that the claimant could perform. Under the new proposal there is an increased burden of proof placed on the claimant. It is unreasonable to expect that all employers will issue statements that they believe a claimant is suffering from a disability and that there are no more accommodations they can make and leaving the employer open to a law suit. The ADA is still in its infancy and until there is a clear indication of the results of this act to incorporate it into the Social Security Act, will just result in many disabled persons being forced to sue an employer in order not to be denied Social Security benefits. It is even more difficult to get a statement that you were not hired because you are disabled. One hopes that the purpose of the Social Security Act is not forgotten in this re-engineering process.

Another proposal is to restrict access to the Appeals Council. The claimant would no longer be able to request that the Appeals Council review an unfavorable ALJ decision, however, on its own motion the Appeals Council could review and reverse an ALJ decision. In the past, the Appeals Council has had the power of own motion review but the fear is, that as in the past (the mid-80's Bellman review for example), the Appeals Council only reviewed favorable ALJ decisions and not the denials. It is difficult to see how this step would benefit claimants.

Unfortunately, this proposal is attempting to get rid of some of the aspects of the Social Security system that work, such as the current sequential analysis. The listing of impairments does a good job of screening the per se disabled claimants. As previously stated, this list is continually updated to stay current with advances in medicine. The grid or medical-vocational guidelines used at step five, works well. It considers a claimant's age, education and prior work experience as well as their impairment to determine whether there are a significant number of jobs that a claimant could perform. Both the listing of impairments and the medical-vocational guidelines add uniformity to the adjudication of these claims.

The proposals will make it substantially more difficult for people over fifty years old to obtain benefits. This is the age group that is most adversely affected by vocational adaptability. The Social Security Act specifically states that age is to be considered when determining whether a claimant is disabled. The regulations state that, "...the absence of any relevant work experience becomes a more significant adversity for individuals of advanced age (55 and over)." Accordingly, this factor, in combination with a limited education or less, militates against making a vocational adjustment to even this substantial range of work (medium work) and a finding of disabled is appropriate." 20 C.F.R. 404, Subpart P, Appendix II , Rule 203.00(c). Individuals approaching advanced age (age 50-54) may be significantly limited in vocational adaptability if they are restricted to sedentary work. 20 C.F.R. 404, Subpart P, Appendix II, Rule 201.00(g). Unless and until it can be shown that this is no longer true, Social Security should not ignore age as a factor in determining disability.

The report discourages attorney representation. (p.73) Since claimants who are represented by attorneys are more likely to ultimately be found disabled, the only reason to discourage attorney representation is to make it less likely for a claimant to be found disabled. The new regulations would establish qualifications for representatives, a code of professional responsibility and a forum for grievances. As a member of the Illinois Bar, I have established my qualifications, have a code of professional responsibility and my clients can pursue grievances against me through the Illinois Attorney Registration and Disciplinary Commission. If representation is restricted to attorneys and non-attorneys (paralegals) under the supervision of attorneys, there is no need for SSA to monitor representatives to safeguard the claimants interest. The disciplinary commission of each state currently performs such a function.

Two of the most troubling aspects of the Report are that none of the important terms are defined and that the entire system is predicated on a complex computer system that is not currently functional nor is there any assurances that it will ever be fully functional. Baseline work, the index of impairments, closely approaching retirement age all pivotal to the determination of disability under the re-engineering report are never defined. Without a clear statement of what each of these terms means there is no way to evaluate the proposal. These terms must be defined before any substantive changes are evaluated.

When reviewing the proposal before you, it is extremely important to keep in mind the purpose of the Social Security Act. The purpose of the Social Security Act, as found in the Congressional Record, is to ensure that aged and disabled persons have enough money to survive. 20 C.F.R. 416.110 notes that the purpose of SSI, "Is to ensure a minimum level of income for people who are 65 or over, blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum level." The purpose of the Social Security Act paternal, protective and remedial. To enact regulations that are unrealistically restrictive defeats the purpose of the Act.

I request that you review this proposal carefully keeping in mind the purpose of the Social Security Act and before any changes are implemented, require the Social Security Administration define the pivotal portions of this proposal.

Yours truly,

Beth A. Alpert

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May 13, 1994

Janice Mays
Chief Council and Staff Director
Sub-Committee on Social Security
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Re: Comments on the Disability Process Redesign of the
Re-Engineering Team

Dear Committee Members:

I respectfully submit my comments regarding the report and proposal
of the SSA Disability Process Re-Engineering Team.

I am an attorney in private practice in Chicago. I have
represented claimants in Social Security and SSI disability cases
at all levels of the administrative process and before the federal
courts for almost 13 years, and exclusively for the last seven
years.

Based upon my experience, I am concerned about the proposals made
by the Re-engineering Team. My concerns are outlined below.

The Re-engineering Team proposes the elimination of the Listing of
Impairments, with a simpler, less inclusive "Index of Impairments"
to be substituted. The only purpose for replacing listings which
have been in use for 15 years and which are periodically updated to
conform with medical advances appears to be to make the listings
more easily understandable by laypersons. This is not sufficient
justification to jettison an existing system which works well,
particularly since laypersons employed by the SSA can call upon
medical consultants for interpretation of technical terms. If the
goal is to provide an index which is understandable to claimants,
a significant portion of whom are illiterate or mentally impaired,
I submit that the index cannot be made simple enough for all
laypersons to understand. A less inclusive index of impairments
works to the detriment of applicants for disability benefits,
particularly when, as recommended , medical terminology is
minimized.

The statute specifically states that an individual's age, education
and past work experience must be considered in determining whether
that person is disabled. The Re-engineering Team's report ignores
education and only considers age or past work experience for those
"nearing retirement age," which is not defined. Instead of the
individualized assessment currently given claimants, the report
substitutes a "baseline" of occupational demands needed to perform
substantial gainful activity. The critical term "baseline" is, at
best, poorly defined. Not only would the changes recommended by
the report result in more denials, the changes recommended are
beyond the scope of the Re-engineering Team's authority, since the
statutory definition of disability was specifically excluded from
consideration by the Team.

The goal of the changes in the listings and the medical-vocational

guidelines appears to be to deny more cases, and that would be the logical effect of the proposed changes. Further, any change in the definition of disability would seem to require that all cases currently pending before the Administration or in pay status be re-evaluated under the new guidelines, which would obviate any minimal time savings gained by "simplifying" the definition of disability.

I am also concerned about the elimination of the reconsideration stage, with the substitution of the "adjudication officer." In my experience, the reconsideration stage is not one in which significant delays occur. The most significant delays currently are at the hearing level, where my clients frequently wait one year from the time their hearings are requested to the times their cases are heard. Eliminating the reconsideration stage is likely to increase these delays, since more cases will go to the hearing level.

The responsibilities of the "adjudication officer" are, as appropriate, to explain the process to the claimant, identify the issues, identify the need for further evidence, conduct informal conferences, refer the case for medical consultation, issue favorable decisions, and schedule cases for ALJ hearings. The multiple roles anticipated by the report for the adjudication officer conflict, and are inappropriate to the role of a fair and impartial decision maker. The adjudication officer's responsibilities are partially investigative, partially secretarial, partially adjudicative, partially represent the administration and partially represent the claimant. Further, the physical presence of the adjudication officer in the hearing office give the appearance of impropriety, since cases not approved by the adjudication officer will remain in the hearing office for hearings before ALJs.

Since the report states that only 14% of cases which are appealed to the reconsideration level are approved, and since 77% of cases which are appealed to the hearing level are approved, the most obvious and least costly method to improve the reconsideration level, increase speed and accuracy, and reduce hearing backlogs is to make sure that Agency employees are trained in and apply their own regulations. It seems absurd to "simplify" the regulations and substantially change the system and THEN train employees, when

merely training employees in the current system might suffice. For example, in Illinois, the quality control group evaluating reconsideration decisions evaluates only approvals. Since 77% of reconsideration denials appealed to the hearing level are reversed, however, it would be far more sensible to review the reconsideration denials and provide feedback and training to employees found to have improperly denied cases.

Another troubling aspect of the report is that representation is discouraged. The report recommends that qualifications be established for representatives; that the duties and responsibilities of representatives be defined (including the duty to fully develop the record in a timely manner to respond to requests to submit evidence); that a code of professional conduct be established for representatives; that a forum be provided for claimants to air their grievances and file charges against representatives, and that meaningful sanctions against representatives be provided.

The best interpretation of the report is that the SSA is trying to address poor representation by non-attorneys. If this is the case, then non-attorneys who are not under the supervision of an attorney should be barred from practicing before the Administration. As an attorney, I have already established my qualifications by completing law school, passing two bar examinations, and retaining a current license to practice. I am governed by a code of professional conduct, and there is a forum in which to air grievances against me or provide meaningful sanctions against me--the Attorney Registration and Disciplinary Commission. The report's suggestions are merely duplicative of existing standards

and practices as regards attorneys.

The worst interpretation of the report is that representation is to be discouraged by the provisions of as many chilling factors as possible. I am particularly disturbed by the suggestion that a code of conduct would govern attorney interactions with SSA employees. I have a duty to zealously represent my client. While I would hope that my duty to represent my client would not be inconsistent with pleasant, professional interactions with SSA employees, I would choose my client's interests if necessary. As I read the committee's report, this would leave me open to complaints and sanctions to be decided by a person or a body not defined by the report. Claimants have a right to be represented by someone who is not threatened with reprisal for zealous representation.

It should also be noted that claimants who choose representation will be penalized financially, since they will be made responsible for obtaining their own medical records, and paying the handling charges for those records. The "partnership" spoken of by the report is really another penalty for electing representation. I attempt to obtain all possible records for my clients, but doing so can increase their costs. I was recently told by one hospital that my client's medical records would cost \$300, a cost which would ultimately be billed to her. The Administration, however, can obtain those same records for a flat charge of \$25. The report makes it clear that represented claimants will pay the cost.

My biggest concern about the re-engineering report is that the ultimate goal seems to be making the SSA into an agency which issues prompt denials with the appearance of fairness, but with little actual fairness. The first steps in this transformation include eliminating or discouraging persons who might challenge the SSA's decisions, such as representatives and vocational advisors. The first steps also include training adjudication officers and putting those officers in hearing offices. It seems to me that the next logical step, hinted at in the report, is the elimination of impartial administrative law judges, to be replaced by agency personnel—the adjudication officers. The agency will then be free to render decisions with far fewer challenges from independent representatives and independent, impartial decision-makers. This is not in the interests of the claimant to whom allegedly "world-class service" is to be provided.

Please review the Re-engineering Team's report carefully. Before any changes are made in the disability definition and/or process, definitions of major terms such as "baseline work" must be issued, and significant questions as to the review of pending and approved cases must be addressed.

Sincerely,

Patricia K. Best

Patricia K. Best

PKB/av

**STATEMENT OF CHARLES N. BONO
TO THE SUB-COMMITTEE ON SOCIAL SECURITY
HOUSE WAYS AND MEANS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
HEARING APRIL 14, 1994
PERTAINING TO DISABILITY RE-ENGINEERING REPORT**

My name is Charles N. Bono. Since 1973, I have been an administrative law judge (judge) with the Office of Hearings and Appeals (OHA), which is a component of the Social Security Administration (SSA). Additionally, I am the elected delegate of the National Conference of Administrative Law Judges in the American Bar Association to the Judicial Administration Division of that organization, and also a member of the Federal Administrative Law Judge Conference's Executive Committee. The opinions and views expressed herein are not presented in my official capacity of any of those groups. They are not intended and should not be construed as reflecting the opinions or policies of the agency in which I am employed, or any of the above organizations.

This document is submitted post hearing. I respectfully request that it be included in the record of the hearings held on April 14, 1994. The three issues pertaining to the Disability Process Re-Engineering Team Report dated March 1994, which I address herein, are as follows:

- 1) The cost of the proposed changes contained in the report;
- 2) Whether the proposed changes will accomplish their stated purposes; and
- 3) The effect the proposed changes will have on the due process rights of the applicants seeking a period of disability, disability insurance benefits and/or supplemental security income.

I. The Cost of the Proposed Changes, Predictably Expensive, Have Been Ignored

Significant and major organizational changes are proposed. Expanded requirements in developing the documentary record and in face to face interviews, at all levels are recommended. Numerous additional higher paid support staff positions, such as the described District Claims Manager (DCM) will be required at the initial determination stage. New equipment, such as hundreds of P.C.s and related systems, will be also be required at that level to achieve the sophisticated input and communications network so depended upon in the recommendations for changes at that level.

The redesigned and larger "Hearing Level" proposed will also require substantial increases in the numbers of support staff positions, equipment and facilities. The addition of a new position, the Adjudicative Officer (AO), heretofore non-existent, whose seemingly important functions should require compensation at a relatively high GS grade, promises considerable additional expense. The number of AOs that will be necessary is not disclosed in the report. It is reasonable to assume that if the AOs are to perform the many functions described, a quantity of AOs comparable to the number of judges, currently approaching 900, will be needed.

Considering only these two aspects of the proposals, and there are many more that would have to be considered, operational costs of the new system proposed predictably will be substantially higher than the 2.5 billion dollar cost now attributed to the Disability Initial Claim and Appeal Activity. No cost analysis of the proposals is presented in the report. No figures are given with respect to the operational costs of any of the levels of processing. Without such information regarding the operational costs of the Reconsideration Determination Level, which is proposed to be eliminated, there is no way to know whether any savings will be realized in the elimination of that procedural step, or whether there will be an operational cost increase.

Operational and administrative costs are certain to increase, if the functions of the reconsideration determination level are simply moved to the hearing office level. It is logical to infer that substantial additions of support staff and more sophisticated P.C. units, network systems and greater space, will be needed in the 134 existing OHA offices in the country. These offices are not currently equipped either in space, staff or equipment to accommodate the increased work load, which will occur. It is assumed that

the "hearing level" referred to in the report is OHA, although that component is not mentioned by name.

Costly changes in procedures to obtain medical evidence also are proposed. The establishment of new standardized forms, overtures to treating Doctors to supply more specific and standardized written documentation, or summaries are recommended. All of this will require the expenditure of much more money. No one could quarrel with a need for better development of the medical record at all levels. The present development systems however, are not at fault in being unable to develop a better medical record. Rather it is the reluctance of the medical community, particularly the treating physicians, to cooperate with the various attempts of the SSA's components to obtain current and meaningful information of a medical nature. This has resulted in considerable operational costs and expenditure when the agency has been required to arrange and pay for "independent" consultative examinations. To add to the problem, funds have been extremely limited to permit payment of costs to doctors for reports and examinations, even when the SSA orders consultative examinations. Thus, substantial increased operational costs reasonably may be predicted, if the recommendations in this area are implemented.

Additionally, the proposals call for numerous regulatory changes and policy changes in implementation of the law, either abandoning or significantly changing long accepted regulatory tests, such as the "Listed Impairments," and the "Medical Vocational Guidelines," and the sequential evaluation procedure. These major changes will be more fully discussed in a following section as to their due process implication, but aside from that issue, the proposed changes will be extremely costly. If implemented, such proposals will require major changes in the existing Federal Regulations. The changes will require substantial amendments to the existing regulations, publication of them and public comment. Previous attempts by SSA to amend regulations have been extremely time consuming and attended with great difficulty. The increased paper work and attendant difficulties to amending regulations is not mentioned. Whatever else can be said, such changes will cost much more than the present systems, even if paper free as the report unrealistically promises.

The cost of the proposed new complicated computer and input systems described in the report are not disclosed or mentioned, the report is incomplete in that important respect. Cost factors in this area may indeed be difficult to assess, but it does little good to spend our time or Congressional time considering recommendations that will be too costly to implement. Yet, those important cost factors are ignored. Ignoring cost factors is not realistic in a day of public outcry for decreased government spending.

Reliable projections of costs have to be obtained before valid consideration of any of these proposals is in order. Without them, the report takes the posture of a "wish list," and these hearings are premature. If such figures are not presented. The proposals should be rejected and should not be implemented, until such time as such figures can be supplied and it can be determined they are fiscally responsible. Even without such figures it is however, is reasonable, to infer from the nature of the proposed sweeping re-organizational, and substantive changes that operating and administrative costs will significantly increase from what they are now.

For the reasons set forth in the next section many of the major proposals for change are, even if they can be afforded, which I extremely doubt, unlikely to accomplish the reforms described. They will, for the reasons described in the next section, compound confusion and lead to increased public dissatisfaction with the system and erode public confidence.

II. The Proposed Changes will not Accomplish their Intended Purposes

The "Re-Engineering Team" asserts three general reasons for the changes they are recommending: "The Public and Third Parties Find the Current Process Confusing;" "Evidence Collection and Decision Methodology Pose Problems;" and "The Fragmented Process Contributes to Difficulties".

No one would quarrel with the first assertion. The public indeed finds the current process of obtaining disability or supplemental security income confusing, and always has. Such processes deal with a very complicated system of laws. Let us be realistic. The entire disability application process is based upon the provisions of the Social Security Act, and its numerous amendments since its enactment, which are not easily explained or understood.² Numerous Regulations and amendments to Regulations published on a yearly basis by the Secretary have driven the program and caused innumerable changes in the manner and method of processing cases from time to time.³ Major reforms and amendments in the law also have taken place over the years, with the last major reform having occurred with the "The Disability Reform Act of 1984 making the processing of such cases more time consuming and difficult than they had been".⁴

Class action law suits, and settlements of those actions by the agency, as well as decisions of the U.S. District Courts, Courts of Appeals, and the Supreme Court interpreting the law have caused many changes over the years in the manner and method in which cases are processed.⁵ These have combined to add to the public's confusion and failure to understand the system.

The representation in the opening pages of the "Disability Re-Engineering Team" report to the effect that "The procedures in the current process have not changed in any significant way since the Social Security Disability Insurance Program began in the 1950's. . . ." ignores the above facts, and is misleading. It is obviously based upon a lack or ignoring of essential information. The many changes in the system over the years has been a major reason for the cited public confusion and dissatisfaction. It is not accurate to assert that nothing has changed in the processing of the cases, when so much has.

Adding to the above, policies of incoming administrations have caused public dissatisfaction and confusion, but again this is not even mentioned. For example, the Reagan Administration implemented procedures referred to as the Accelerated Continuing Disability Review (CDR) program in the 1980's. Thousands of people were summarily removed from the disability roles as the result of this policy. Because these policies were so unfair and caused such a public outcry, a moratorium on that program had to be declared by the Secretary of HHS. Many of the people removed were reinstated, some reportedly took their lives. The report ignores such important facts, and the entire question of the continuing disability review fiasco of the '80s, incorrectly asserting that nothing has changed in the processing of cases since the 1950's.

The disability program thus has had many changes over the years. The case processing procedures have had to accommodate those changes. These changes, occurring so many times and so rapidly have understandably led to public confusion. Now this report would recommend major and more drastic changes. In my opinion, the changes proposed are so many, and of such a nature that they will further compound public confusion and lack of confidence in the system. Simplification of such complicated laws and proceedings will not be accomplished just by making organizational or procedural changes that transfer functions from one component to another. It does not matter at what stage a law is interpreted and implemented, if at any stage it is the same complicated law. Congress must change the law, if it is too complicated and proving to be so unwieldy that it cannot be implemented fairly, without public confusion and dissatisfaction.

Congress has refrained for many years, from making any changes in the provisions of the Social Security Act defining disability. Although obviously concerned about growing backlogs and the increasing age of cases in process. It has also refused to put case processing time limits on disability cases, even when realizing an increasing backlog and case delays. A strong justifiable conviction exists in Congress that such time limits would make the processing of such cases unfair, because it would in many cases impede appropriate development of the facts and result in erroneous decisions.

There also has been an understandable reluctance to deal with the definition of disability, which some argue is either too liberal, complicated or confusing. A strong case can be made that the definition and complication of the law has in large measure been responsible for the contradictory Court interpretations of the law that have lead to confusion. Succeeding administrations in the applications of their policies to deal with the

confusion have consequently attempted to effect the definition of disability. This has caused even more confusion. For example SSA applies even now a criticized policy of "Non-Acquiescence" in dealing with conflicting court opinions refusing to give national consequence to court interpretations, unless such interpretations comply with agency policy. This has long prevented court resolution of conflicting court interpretations of the law and promises constitutional crisis in permitting the agency to ignore court interpretations of the law. Nothing in the report or recommendations addresses this issue, the very real problems it causes, and the public confusion it continues to generate.

The report ignores the above causes of confusion and mistakenly blames it on what is referred to as a "fragmented" case processing system. The report suggests confusion will be eliminated, and the system will be "streamlined" by simply taking out a step in the case processing. The proposal to eliminate the reconsideration step may at first appeal to those who would simplify the process.⁶ After all, it is eliminating a step, or is it? It may be simply adding an AO to do the same thing at the hearing level. A realistic appraisal of that change raises significant other questions, and casts doubt on the assertion that it will in fact eliminate confusion.

This proposal to eliminate the reconsideration determination step is nothing new. It is by no means an innovative recommendation as one would expect from a re-invention report. The defects of the operation of the reconsideration level have long been recognized. In the early 1980's that step was referred to as a "rubber stamp" procedure. Proposed legislation in the past to improve and strengthen the reconsideration step, and cure its obvious defects by providing many needed improvements, and face to face interviews at that level has never been implemented by SSA, and are not even mentioned in the report.⁷ Still dissatisfied with the procedural defects and the rubber stamp nature of the determinations at that level, and ignoring the fact that such elimination will rush the cases on to the most complicated level of processing, the sweeping representation is made that elimination of the step will improve the appeals system and somehow eliminate confusion and the delay attendant to the reconsideration determination level procedure. In reality, such an elimination gives the applicant one less chance to prevail and could be perceived as unfair. The change will also logically increase public confusion as to just what happens at the described new bigger and more complicated hearing level.

Such a change will give grounds for applicants to believe that the hearing level is no longer presided over by the independent and impartial judge, whose independence is protected by the Administrative Procedures Act (APA), as it was in OHA. There will be an obvious appearance of impropriety. An agency employee, the AO, whose impartiality is not guaranteed and who will be subjected to pressures from the agency, will preside over the hearings level in some of the most critical aspects of the proceeding. Thus more confusion, and even distrust, and lack of confidence of the public in the system will be fostered.

Nothing in the report deals with the question as to whether the confusion and delay of the reconsideration level will simply be transferred to the "hearing level." It is no solution to the inadequacies of the reconsideration determination level to simply eliminate them in one place and put them in another. The major part of that determination level's function and delay will predictably be moved into the jurisdiction of the hearing level component. An important difference will be that the AO's procedures, unlike the reconsideration determination level's will impact on the hearing held by the judge, and will not be separate and apart from it. The De Novo status of the hearing heretofore existing will be thus be destroyed, if this proposal is implemented.

This proposal, if implemented, also will put a larger volume of cases, which formerly were at the reconsideration determination level, directly and more quickly into the hearing level. The hearing offices currently are unable to handle even the existing volume of cases, because of lack of sufficient support staff, equipment, and facilities. Nothing in the recommendations recognizes that this inability will most likely continue and indeed be aggravated with further delay and even greater backlogs. It may look good on a chart to reflect the elimination of the step, but it is not all that meaningful when there is no elimination and rather just a shift to another level.

The recommended change is also compounded in its difficulty by the insertion of an alarming procedural requirement that cases will within 45 days of the date of the request for hearing, either be resolved in claimant's favor by the AO, or scheduled for hearing before a judge. Thus, mandatory processing time elements are placed in the mix, apparently to avoid a predictable backlog. The proposal ignores reality. The problem of the current backlog is not even mentioned. How is a case going to be scheduled in 45 days with a 10 month backlog presently existing in most hearing offices?

Mandatory time rules have never been approved by Congressional or Regulatory action for very good reason as previously stated. They should not be permitted to be implemented by an agency indirectly as here recommended. Again in this recommendation we have the proposal of a change which is neither new nor innovative. It is as well representative of past discredited agendas of SSA. Efforts were previously been made by SSA to put time frames on the processing of cases at the hearing level. The agency went so far as to propose the implementation of sanctions on the judges, if cases were not disposed of in a given period of time. Such proposals have failed approval at both the Congressional and court levels and should not be resurrected.⁶ Of course, applicants are interested in receiving timely service and it should be provided to them, but not by implementing arbitrary and capricious administrative hammers to achieve them. There is a difference, between "timely" service, and simply quick, speeded up or forced accelerated service. Timeliness in due process hearings requires fairness. Timeliness cannot be artificially enforced by processing time guidelines, which may be arbitrarily conceived and promise to be unfairly administered by their unreasonable nature. Any quick decision the applicant receives from such procedures promises to be an incorrect one, and certainly may be unfair to either the applicant, or the trust fund. The decision maker will have been rushed to judgement in cases that are complicated, not fungible, and do not lend themselves to standardization. Congress has always recognized this important fact.

Recognizing a need for a better developed medical record and better evidentiary development is justified. A careful reading of the proposals made to accomplish this, however, reveals that they are based upon fallacious assumptions. Representations are made in the report that a better working relationship with the medical community, treating doctors, and indeed a partnership with the applicants and their representatives will be fostered. Those improved working relationships are represented to be the basis for expecting better developed evidentiary records, more simplified standardized procedures, and simplified standardized decisions. A careful review of those proposals, in light of the continuing problems the present system has had in obtaining medical reports from applicants, treating doctors, appropriate medical examination reports and assessments and even from consultative examiners paid by the SSA, make the glowing promises of those recommendations less than realistic, and hardly obtainable.

There is little realistic hope that the proposals to develop a better medical record as described, even if implemented, will do what they are intended to do. Asking doctors or the medical community to do more, when they have demonstrated for so many years that they will not cooperate when asked to do less, promises to be an exercise in futility.

The proposals also include recommendations to shift from the present regulatory "Listings of Impairments" to an "Index of Impairments." The new index to be developed is to contain "fewer impairments." Therefore, there will be a reduced number of impairments for which a person can be found disabled on medical considerations alone. Additionally, the proposal indicates that the criteria in the index of impairments will be less detailed. Thus, what was formerly a technical medical test to be employed to determine disability, without consideration of vocational factors, is to be made less technical, less detailed. It is logical to conclude that being less technical such medical tests will be less reliable and offer less medical guidance than the former listings of impairments. This proposal as well, will not reduce confusion. It will increase confusion. It will not simplify anything. It will increase the difficulty of determining whether a person is entitled to benefits on medical considerations alone. Less detail and complexity in such an area of medical expertise can only permit wider interpretations and increase public confusion, and lead to inconsistent decision making, requiring more time and further delay over the present system.

A significant change is also recommended in the "sequential evaluation" process now dictated by the regulations. Changes in these areas must be viewed with alarm. In the past, changes in the manner and methods of processing cases by the SSA have resulted in class action litigation, and in some instances have caused mass re-adjudications of former applications previously denied under dissimilar policies.

The major proposals for change described above will, for the foregoing reasons, not do what they are intended to do. Indeed, if implemented, they promise to do more harm, increase delay and cause greater public confusion, dissatisfaction and lack of confidence.

III. Due process rights of the applicants seeking relief under the provisions of the Social Security Act will be adversely affected.

The foregoing sections of this document have only briefly touched upon many troubling aspects of the proposals of change, which would significantly change the operations of the Office of Hearings and Appeals (OHA), and affect the rights of the applicants to a hearing before a judge. It is OHA, which is the component where the applicant has the right to a hearing before an independent and impartial judge. This component of the appeals process is not mentioned by name in the report, but it will be profoundly affected. Judges, appointed under the provisions of the Administrative Procedure Act (APA), by law and regulation are insulated from Ex Parte communications from the agency official or case investigators. They are specifically exempted from supervision in the performance of nineteen enumerated functions set forth in the official United States Office of Personnel Management (OPM) approved position description.⁹ They are empowered by regulation to schedule the time and place of the hearings, select documents to be made as Exhibits and enter them into the record, and perform the functions enumerated under the provisions of the APA.¹⁰ The judges serve under direct delegation of authority from the Secretary of Health and Human Services to perform the functions of their office. That important fact is sometimes overlooked, or perhaps ignored by agency administrators when they attempt to implement systems or recommend changes which impair that delegated authority.

The judge's authority and ability to fairly perform the functions of their offices must be preserved. Proposals that would impair such authority must be avoided, for reasons too obvious to recite. The proposals to create a new position as described, the AO, are most alarming and promise to impair the ability of the judges to function, if implemented. The proposals would empower the AO to perform judicial functions, heretofore reserved to the authority of the judges. For example, the proposals would permit the AO, not the judge, to schedule the cases that are to be heard by the judge.

Present regulations place the authority to schedule the time and place of hearing, and to govern the proceedings in the authority of the judge.¹¹ That authority must remain with the judge. It is essential to the fairness of the hearing process. Only the judge assigned to the case can properly determine when the case is ready for a hearing to be scheduled, when it should be scheduled, and how much time should be allowed for the hearing of the case. The change proposed would adversely impact on the due process rights of the citizenry. It would not protect the fairness of the hearings process, and would in fact make the judges powerless to protect it. Under no circumstances should the judge be stripped of this essential authority to schedule the time and place of the hearings and thus properly manage his or her own docket. Administrators in SSA have proposed this change before. It is neither new or innovative. It is reflects SSA agendas of the past. Such proposals have met with justified resistance from the judges, and for valid reasons, will predictably continue to be resisted. They are obviously favored by administrators to achieve announced quotas in the number of cases to be heard and decided per month by judges. Such proposals and agency attempts to enforce them led to litigation in the late 1970's, and court settlement agreement wherein the agency agreed not to establish such quotas, or goals. Such settlement agreement is still in effect, and it is not even discussed in the report.¹² It predictably will lead to renewed conflict between the judges, who have a mission to assure due process, and agency management officials, whose missions at times have nothing to do with due process.

If that were not enough of a problem, the proposals go further and vest the AO with the authority to order evidentiary development and: select pertinent documents to be used as evidence; hold pre-hearing conferences; enter into stipulations; determine and narrow the issues to be decided; determine whether the case can be allowed, or whether it needs to be tried; and schedule the case as aforesaid. These are also functions presently reserved to the judges. While it is indicated in the report that the AO may consult with a judge in performing those functions it is clear the AO and not the judge will have the ultimate authority in determining what development will be pursued.

The authority to supervise direct and control the AO in the performance of his or her functions is not going to be in the judge. Rather, the AO will be managed, supervised and controlled by a Hearing Office Manager (HOM) who will be his or her immediate supervisor. Viewed in the light of the performance of past SSA management configurations and empowerment of HOMs, a mere requirement that the AO consult with the judge is meaningless, and will most likely be observed more in the breach.

Importantly, the proposals, if implemented, will permit the AO, an employee of the agency who is not protected from pressures from the agency by the APA, to perform and control essential judicial functions heretofore reserved by law to judges. If implemented, they will obviously permit an AO to interfere with and impede the functions of the judge. The implied powers of the AO overshadows the role and function of the judge. Such powers will turn the protective provisions of the APA into meaningless verbiage. In the representations of the "Re-Engineering Report" and in all the documents circulated before the report was issued preliminary to interviews by task force members etc., two assurances were given. The first was that no change in the definition of disability would be proposed. The second was that the right of an applicant to a hearing before a judge and the procedures attendant to it would not be changed.

For the reasons previously stated the definition of disability in the law will be profoundly affected. Although the statutory definition of disability may be unchanged, the first assurance is not realized in effect. The second assurance, that the rights of an applicant to a hearing before a judge were not to be changed, as well is not realized by the proposals and indeed contradicted. The proposals will significantly change operations at the hearing level undermining the authority of the judges and raise significant doubts of the continued viability of OHA as an independent component.

The recommendation to establish the AO position is not new. It is representative of an old agenda. It is troubling, because it recalls recommendations of a former Commissioner of Social Security published in a 1976 in a Federal Times article "Meet the Candid Bureaucrat." In that article he voiced his displeasure and hostility to the administrative law judge system. He recommended replacement of judges. He believed it would be easier for the agency to do away with them. He suggested they could be replaced by individuals called hearing officers or presiding officers, who would not be protected in the decisional and functional independence by the APA. He perceived that such non-APA hearing officers would be more receptive to policies and dictates of the agency. He felt that they could be more easily controlled to carry out the agencies mission.¹³ Later such recommendations were contained in a special report for the Reagan Administration's transition team in 1980 for the incoming reagan administration. It came to be known as the "Lambrea Report". It was never implemented. It was a bad idea then, and it is a bad idea now. Changing the title to AO and given vacant assurance of permitting the judges to continue in some form of authority does not cure the error of the proposal.

It is as well discouraging because it indicates a mind set that has long existed in certain administrator groups in SSA opposing utilization of administrative law judges. Significantly, there is language in the report questioning the need for administrative law judges in the future. Although such language is modified by an acknowledgment that such considerations are beyond the task of the report, it is nonetheless there for all to recognize. To be sure there has been a long standing but understandable conflict between SSA administrators, and the judges with respect to the functions of judges and the protection they are entitled to under the provisions of the APA. Records of Congressional hearings from 1975 to the present give evidence to that fact.¹⁴ Litigation has ensued between the agency, and the Association of Administrative Law Judges, Inc. to resolve those problems when the agency implemented a system to reduce the

allowance rates of judges under the guise of what was called "Bellmon Review".¹⁵ That litigation resulted in the agency announcing it had discontinued the review. If the AOs are empowered to allow cases, is it not illogical to expect the agency will as well try to control their allowance rates, as they did the judges. AOs will be more vulnerable to such controls, because they are not protected by the APA.

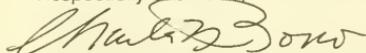
If the AO position is implemented at the hearing level as proposed, it will lay the groundwork for SSA to eliminate first the importance of the position of the judge, and predictably the judges position itself. It is equally clear that if the proposals to establish a position of AO, with the functions described, are implemented in the hearing offices the judges, known to be guardians of the due process rights of the applicants will be powerless to exercise their enumerated functions and decide cases fairly, if not eliminated altogether. Due Process will be seriously impaired.

IV. Summary

In summation, the Disability Re-Engineering Team Report is seriously flawed. It contains recommendations for changes that will not create a better system, but an inferior one. What promised to be an important study for unexplained reasons has fallen victim to buzz word terminology, re-engineering and re-invention hype, and obvious public relations gimmicks. Other valid, and more realistic recommendations for change to this Task Force have obviously, either been ignored, or overlooked. I submitted to the task force, and I know other judges and groups have as well, more realistic recommendations for reform that would be more appropriate, and which would insure continued due process. I will supply the sub-committee with such suggestions upon request.

Much more needs to be done. Many factors not treated in the report, only a few of which I have been able to point in the page limitations of this paper, must be considered before any actions are taken on the recommendations contained in this report. The Social Security Administration, in the interim, should not assume that any of these recommendations are valid, and hastily, in its obvious zeal to re-invent government, implement them. Due care requires more than this report provides to insure due process.

Respectfully submitted,



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FOOTNOTES

- 1) Disability Process Redesign, The Proposal and Background Report from the SSA Disability Process Engineering Team, March 1994. Pages 16 & 17.
- 2) Social Security Act Titles II and XVI Sections 221 (a) through (j), 223 (d)(5)(B), Sections 1614 (a)(3)(G) and 1633.
- 3) 20 CFR Parts 404, 416 and 422.
- 4) The Social Security Disability Benefits Reform Act of 1984. H.R. 3755 enacted on September 19, 1984 dealing with review of terminations, reapplication, notices of review, demonstration projects on face to face hearings at the initial level of determination, benefits pending appeal, collection of medical evidence, uniform standards under the Administrative Procedure Act, etc.
- 5) Polaski vs. Heckler, 751 F.2nd 943, 948 (8th Circuit 1984).
 Sullivan vs. Zebley 493 U.S. 521, 110 S.Ct. 885 (1990).
 Boyd et al vs. Bowen 83-0352-CV-W-JWO W.D. Mo. Class action evaluation of pain.
 Hyatt vs. Heckler U.S.District Court Western District of North Carolina C-C-83-655 M 757 F. 2nd 1455 (4th Circuit 1985).
 Bowen vs. City of New York 476 U.S. 467 (1986).
 Hyatt vs. Bowen 476 U.S. 1167 (1986).
- 6) Disability Process Redesign The Proposal and Background Report from the SSA Disability Process Re-Engineering Team, March 1994 pages 52 and 53.
- 7) Disability Amendments of 1982 Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means House of Representatives Ninety Seventh Congress Second Session on H.R. 5700, March 16 and 17, 1982, Serial 97-54 98-188 O U.S. Government Printing Office Washington 1982.
- 8) Heckler vs. Day 194 S.Ct. 2249 (1989) "The Supreme Court noted that deadlines for resolutions of disability were considered by Congress as subordinating quality to timeliness."

 Sammie Gail Blankenship et al. vs. Secretary of Health and Human Services Consolidated With Georgia Finch, et al vs. Secretary of Health and Human Services United States District Court Western District of Kentucky at Louisville, Civil Action No C 75-0815-L (A) and C76-0441-L-A 1981.

 Proposed amendments to 20 CFR Parts 404 and 416 (90/30 day time limit regulations published for public comment Federal Register Vol.45 No.40 February 27, 1980 proposing time limits for a hearing, time limits for issuing a decision.
- 9) United States Office of Personnel Management Position Description, Administrative Law Judge (Licensing and Benefits) 8/26/85.
- 10) 20 C.F.R. Ch III (4-1-93 Edition) 404.929, 404.944, 404.951, 416.1444, 416.1446, 416, 416.1448.
- 11) 20 C.F.R. Ch III (4-1-93 Edition) 404.936, 416.1436.
- 12) Bono et al vs. U.S.A. SSA et al. No.77-0819-CV-W-4-W.D.Mo. 1979.
- 13) Federal Times Article "Meet the Candid Bureaucrat" July 26, 1976.

14) Delays in Social Security. Appeals September 19,26, October 3 and 20, 1975 Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means House of Representatives Ninety Fourth Congress First Session 59-762-0 U.S. Government Printing Office Washington 1975;

"Disability Insurance Legislation " Proposals to Improve the Disability Insurance Program" Feb. 21, 22, 28; March 1, 5, 9, and 16 1979;

"Selection and Oversight of Administrative Law Judges Hearings Before the Committee on Post Office and Civil Service House of Representatives Ninety Sixth Congress Second Session on HR 6768 April 24, May 6, 1980 64-330-0 U.S. Government Printing Office Washington 1980; "

Oversight of Social Security Disability Benefits Terminations" Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs United States Senate Ninety Seventh Congress Second Session May 25, 1982 97-866-0 U.S. Government Printing Office Washington;1982;

"Social Security Disability Reviews: The Role of the Administrative Law Judge" Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs United States Senate Ninety-Eight Congress First Session June 8, 1993 24-067-0 U.S. Government Printing Office Washington D.C. 1983;

"Social Security Disability Reviews: The Human Costs" Joint Hearing Before the Subcommittee on Social Security of the Committee on Ways and Means House of Representatives and the Special Committee on Aging United States Senate Ninety Eight Congress Part 3 March 24, 1984 Serial 98-79 35-455-0 U.S.Government Printing Office;

"Social Security Disability Reviews A Federally Created State Problem", Hearing Before the Select Committee on Aging House of Representatives Ninety Eight Congress First Session June 20, 1983 24-760-0 U.S. Government Printing Office Washington 1983;

"Social Security Disability Reviews: A Costly Constitutional Crisis", Hearing Before the Select Committee on Aging, House of Representatives Ninety Eight Congress Second Session February 28, 1984 33-940-0 U.S. Government Printing Office Washington: 1984;

"Judicial Independence of Administrative Law Judges at the Social Security Administration", Hearing before the Subcommittee on Social Security of the Committee on Ways and Means One Hundred First Congress Second Session June 13, 1990 Serial 101-117 35-024 U.S. Government Printing Office Washington 1990;

"Administrative Law Judge Corps Act" Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary House of Representatives One Hundredth Congress on H.R.1554 and H.R.2726 Administrative Law Judge Corps Act March 17, 1988 Serial No.57 85-900 U.S.Government Printing Office Washington: 1988;

15) Association of Administrative Law Judges vs. Margaret M. Heckler et al, 594 F.Supp. 1132 D.D.C.1984.

May 13, 1994

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Sub-committee on Social Security
Committee on Ways and Means
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**RE: Social Security Administration
Reengineering Team's Disability Process
Redesign Report**

Dear Sub-committee Members:

I respectfully submit the following comments on the March 1994 Disability Process Redesign Report (hereinafter "Report") of the Social Security Administration Reengineering Team (hereinafter "Team").

Brooklyn Legal Services Corporation B is a not-for-profit law office that provides free legal representation to indigent individuals in civil law matters. Since 1984, I have been the attorney in charge of this office's Social Security law practice. In that capacity, I have personally represented, and have supervised the representation of, thousands of clients before the Social Security Administration. I have also had extensive experience in federal court litigating both individual and class action lawsuits against SSA.

I met with members of the Team on two occasions -- at the Washington, D.C. office of the National Senior Citizens Law Center on December 15th, and at SSA's Region II Office in New York City on February 16th. Given the complexity of the job that it was assigned and the relatively short time period it was given to complete it, the Team has done a commendable job. At least with respect to the procedures for processing disability claims, the Team has managed to consult with a broad array of individuals and has done an excellent job of identifying the major problems with the current system.

However, for the reasons set forth below, I have strong reservations about two aspects of the Team's recommendations. First, with respect to the recommendations for improving the procedures for processing disability claims, additional safeguards are needed to protect claimants who require assistance in pursuing their claims and to ensure that disability claim managers do not misuse their powers.

Second, the Team's recommendations concerning the methodology for deciding disability claims were made without adequate consultation with experts and without the considered research and analysis that this complex subject deserves. I strongly urge that no action be taken to implement the methodology recommendations.

**I. THE TEAM'S RECOMMENDATIONS ON THE PROCEDURES FOR
PROCESSING DISABILITY CLAIMS**

The Report makes a number of sound recommendations for improving the procedures for processing disability claims. Foremost among them are: (1) the elimination of the reconsideration stage of administrative review in exchange for a personal

Toward justice and
dignity for all.

For justice y
dignidad para todos.

interview prior to the issuance of an initial denial determination; and (2) the limitation of the Appeals Council's jurisdiction to "own motion review" cases. Implementing these two steps should substantially shorten claim processing times without causing any appreciable loss of decision-making accuracy. I wholeheartedly support both recommendations.

However, special precautions must be taken to ensure that all claimants who require assistance in pursuing their claims actually receive that assistance. Disability claims managers must remain vigilant not to assign claimants with more responsibilities for claim development and evidence-gathering than they can handle. Claims managers must understand that claimants not only have cope with functional limitations imposed by their impairments, but must contend with such adversities as indigency, lack of medical insurance coverage, homelessness and other personal crises, poor education, illiteracy, the inability to communicate in English, the inability to follow through on instructions, and the inability to understand and make themselves understood by others. To complicate things further, many claimants do not have easy access to telephones, much less to fax, E-mail, or video-conferencing equipment, or to convenient and affordable means of transportation. And many claimants receive their medical care at impersonal clinics where they are seen by different doctors on each visit.

In addition, special precautions must also be taken in defining the role of the disability claim managers. Assigning a single claim manager the responsibility for processing and deciding initial disability claims, as well as for being the focal point of claimant contacts throughout the claim intake and adjudication process, should confer many advantages to claimants. However, great care must be taken to ensure that that claim managers do not misuse their powers.

To begin with, when cases are screened prior to the filing of an application, claim managers must be careful not to dissuade claimants from filing applications. Claim managers may find it difficult to retain their objectivity about the merits of a claim if their caseload size will increase by the filing of an application.

Similarly, when claims are denied at the initial level, claim managers must be careful not to discourage claimants from appealing those denials. Unfortunately, claim managers may feel that the quality of their decision-making is being called into question when claimants appeal their denial determinations.

Furthermore, steps must be taken to ensure that subjective factors do not improperly influence claim managers in either the decision-making process or the processing of claims. It is crucial that claimants be given the right to have a new claim manager assigned to their case whenever their claim manager demonstrates signs of impartiality.

II. THE TEAM'S RECOMMENDATIONS ON THE METHODOLOGY FOR DECIDING DISABILITY CLAIMS

At the outset of both the meetings that I attended, members of the Team made it clear that the statutory standard for assessing disability was not within its parameters. At no point in either meeting did Team members either discuss their views or solicit the participants' views on SSA's current methodology for deciding disability claims, namely the five-step sequential evaluation.

Indeed, at the first of the two meetings that I attended,

participants were advised that the National Academy of Social Insurance was in the process of performing an extensive, multi-year study of SSA's standards for evaluating disability. It was my understanding that SSA would await the results of that study, which are expected to be published next year, before considering any changes to the sequential evaluation.

I was therefore taken aback to learn that the Team had not only decided to include recommendations on methodology in its Report, but had recommended drastic changes to the sequential evaluation. In light of the fact that the Team made its methodology recommendations in a short time period, without adequate consultation with vocational experts, medical experts, attorneys, and other informed sources, and without the benefit of any studies on whether decision outcomes would be affected, none of these recommendations should be implemented.

Contrary to the Team's assertions, the methodology recommendations in the Report are neither consistent with the Social Security Act's definition of disability nor outcome-neutral. In essence, the Team is recommending that all claimants (with the sole exception of certain claimants in the as-yet-undefined group of claimants "nearing full retirement"), regardless of their functional limitations, age, education, or work history, be evaluated against a single "baseline" of work activity. This one-size-fits-all approach to disability assessment can only work to the detriment of vocationally disadvantaged claimants, such as older claimants and claimants who have marginal educations, no work skills, and poor English communication skills.

To compound this problem even further, the Report's description of "baseline work activity" indicates that this baseline will be set at a level even lower than unskilled sedentary work, which is the lowest of the three categories of work currently employed in the Secretary's Medical-Vocational Guidelines. As the Report states, "[t]he range of work represented by less than the baseline will be considered so narrow that despite any other favorable factors, such as young age or higher education or training, an individual would not be expected to have a realistic opportunity to perform substantial gainful work in the national economy." [Report at p. 44.] [Emphasis added.]

Particularly problematic is the Team's decision to include in "baseline work activity" "any reasonable accommodations that employers are expected to make under the Americans with Disabilities Act." [Report at p. 42.] This recommendation fails to take into account the fact that many employers do not provide reasonable accommodations to their employees. The ADA does not apply to employers of less than 25 employees (in July, only employers of less than 15 employees will be exempted). Furthermore, the ADA does not require employers to provide accommodations in situations where it would be an undue hardship, or otherwise unreasonable, for the employer to do so. Moreover, many thousands of complaints have been filed with the Equal Employment Opportunity Commission alleging employer failure to accommodate disability, suggesting that employer non-compliance with the ADA is quite extensive.

The Social Security Act does not permit claims to be denied based on a mere theoretical possibility that "any reasonable accommodations that employers are expected to make under the [ADA]" are, in fact, being made for significant numbers of jobs in the national economy. As Daniel Skolar, Associate Commissioner of Hearings and Appeals stated in his well-reasoned memorandum of June 2, 1993, "the ADA and the disability

provisions of the Social Security Act have different purposes, and have no direct application to one another."

In addition, the Team's recommendation that the Secretary's Listing of Impairments be replaced with an Index of Disabling Impairments that contains "fewer impairments and ha[s] less detail and complexity" is highly problematic. [Report at p.39.] This recommendation would have an adverse impact on those claimants who are most severely disabled.

The Listings contain medical descriptions of impairments that are recognized by SSA to be per se disabling. They were developed after consultation with the medical community and review of public comments. In the case of the HIV Listings, which were issued last July, SSA received several thousand sets of public comments. Claimants whose impairments meet or are medically equivalent to the Listings need not establish their functional limitations in order to be found disabled. As a result, Listing-level cases can be processed much more quickly than cases that require assessment of function.

If the Listings were to be eliminated, claimants who would have been found disabled based on the Listings will not be found disabled until such time, if any, as medical evidence of their functional limitations and inability to perform "baseline work activity" is submitted. Because many claimants do not have physicians who are willing to take the time to write such reports, the most disabled claimants may have their claims denied if the Listings are eliminated.

CONCLUSION

In conclusion, a number of the Team's recommendations for improving the procedures for processing disability claims have great potential for improving agency accuracy and efficiency. Before they are implemented, however, it is crucial that adequate safeguards be put into place to protect claimants who need assistance in order to pursue their claims and to ensure that disability claim managers do not misuse their powers.

On the other hand, none of the Team's recommendations for changing the methodology for deciding disability claims should be implemented. These recommendations were made in a short time period, with no, or very limited, consultation with experts. The question of how to evaluate disability is extremely complex and deserves careful research and analysis by experts in a wide variety of disciplines, as well as broad public input. The upcoming recommendations of the National Academy of Social Insurance should be reviewed before any legislative or administrative steps are taken to change SSA's methodology for evaluating disability.

Thank you very much for your attention to this matter. If questions arise, please feel free to call me at (718) 237-5547 or 237-5500.

Sincerely,

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April 11, 1994

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RE: Disability Process Redesign
of SSA (April 1994)

Dear Ms. Mays:

I have reviewed the Summary Report (28 pages) (SSA Pub. No. 01-003) since I was unable to obtain a copy of the full proposal of the Disability Reengineering Team. Based on my review, I wish to make the following comments:

1. The delays are measured in time. Yet two sets of standards are being used:
 - a. SSA's computer-based processing time measurements (page 7) or
 - b. Office of Workforce Analysis (page 7)
See also: page 11 for "current" and "new" processing times.
- Q. Which standard will be used to measure success or failure of the new system? Or will another standard be used? Is the Committee aware of any manipulation of files in order to make District Office Managers "look good" on the timely disposition of applications and appeals?

2. Applications for disability may be made electronically by third parties on behalf of claimants (page 12) as part of the on-line automated claims processing system (page 14).
 - Q. Will attorneys in private practice and other representatives have on-line access through any of the current systems in use by the business community?
3. The disability claim manager will advise the claimant "regarding the right to representation including referral sources for representation." (page 13)
 - Q. What will be the basis for becoming a "referral source for representation;" (page 13), the basis for certification as a "third party organization who are capable of providing a complete application package, including appropriate application forms and the evidence necessary to adjudicate a disability claim." (page 14).
4. In making a disability determination, "SSA will consider. . . medical personnel, other than physicians, can provide evidence of a medically determinable impairment." (page 15).
 - Q. Since this is already being done, is this statement a restatement of existing policy; or will "non-medical personnel" be expanded to include nurses, social workers or others in allied health services as "evidence"?
5. Since the law requires any disability to prevent work for at least one year or longer, SSA will deny any application based on a medical condition "that will clearly not meet the 12 month duration requirement (e.g., a simple fracture)".

I assume that the Trial Work Period exception will still be in force. Unless the example will extend to other more controversial areas such as Substance Abuse, Chronic Fatigue, Myocardial Infarct, Severe Asthma without E/R visits, I thought that this is a restatement of existing policy.

From my own viewpoint, this type of denial will be an easy "out" for lazy Adjudicators and generate a significant number of appeals to ALJs.
6. The Listings of Impairments will be replaced by an Index of Disabling Impairments that takes into consideration remedial rights to claimants under the Americans with Disabilities Act (page 14, Step 3)

- Q. Will all states that administer the Program be required to use the same forms as completed by attending and treating physicians? Or will the current practice of sending out different Cardiac Report forms to residents of Illinois v. residents of Indiana continue? What is the basis for this practice? Different hearts?
- Q. Since the ADA is a relatively new law, how will SSA interpret "reasonable accommodations"? The same as the Department of Labor? (page 17)
- Q. If the ADA is a good idea, why not impose the Age Discrimination Act as well?

COMMENT: As a practical matter, many people who are legally disabled (i.e., blind, double amputee in a wheelchair, dying of AIDS/HIV or cancer) actually work. But there are many others who have the same (or worse) type of illness who don't (can't, won't) work. In an economy that has more people of working age and less number of real jobs (due to efficiency/technology), those who are sick and can't find a job will turn to whatever resource is available--including disability. Many of my clients would love to go back to work but can't do their old job. "Nobody will hire me; I've looked, and applied." Other clients are marginally employable and could physically do some kind of work. But, lack of education, motivation, work skills, erects barriers that are difficult to surmount in a highly competitive work market. God knows there are plenty of un-employed attorneys.

- 7. What is the basis for assuming that "succeeding generations can expect to remain in the workforce for longer periods than the preceding generation?" (page 17). I would suspect that exactly the opposite is true. Higher wage workers will be "retired" (RIF'd) earlier as labor intensive industries become more efficient. The "electronic highway" if structured right, should eliminate many information brokers and streamline such industries as insurance, travel and finance.
- 8. The Act requires SSA to consider "age" as a factor in making disability decision. When the regulations regarding "age" were first adopted, Social Security adopted a rationale for age 45, 55 and 62 as cut-off dates based on certain studies (page 17).

9. Functional demands of any job matched to functional abilities of any individual will determine whether someone is disabled or not (page 17). As a result the definitions given to such terms as:

- a. "standardized functional measurement"
- b. "physical and mental demands of a baseline of work"
- c. "reasonable accommodations" under the ADA
- d. "skill acquisition threshold" (page 18)

will be extremely important to the outcome of claims.

Q. Is SSA aware that the Dictionary of Occupational Titles, one of SSA's traditional benchmark references for "jobs" information, is undergoing an extensive revision by the Department of Labor? Is SSA involved in this process? Will "baseline of work" be a concept incorporated in the DOT?

10. Since SSA will use "medical consultants" (page 18) extensively as advisors on individual claims, does it make sense for SSA to use these same doctors/medical consultants as the experts determining the quality of their own advice? Who reviews the reviewers?

11. SSA is truly caught in a difficult situation with children. The Act allows benefits to those who are kept out of the workplace by virtue of an illness. Yet children are kept out of the workplace by law. The Supreme Court filled in this gap by requiring SSA to assess childrens' "residual functional capacity" (ala adults). Unfortunately, the standard ("age appropriate activities") suggested by the Court is somewhat malleable. Decisionmaking is rather unpredictable without more realistic standards. SSA should be commended for trying to establish a "baseline of functions" for children.

Q. How will SSA treat the 16 year old disabled SSI child when he is 25 years old, still disabled and

being measured by a different standard? Especially when this "child" has grown to age 25 without any work history that SSA recognizes?

12. Decisions are based on evidence. Health care providers furnish such evidence to SSA. These providers are grossly underpaid by SSA. In the private sector, a doctor's (treating source statement) written report in Chicago runs from \$350.00 to \$700.00 depending on various factors. Many doctors just refuse to deal with the State Agency. Even the hospitals are not adequately reimbursed for medical records copied and sent to SSA/BDDS. I strongly commend SSA's effort to establish a "national fee reimbursement schedule" (page 19) based on a "sliding scale to reward early submissions of" records.

Based on previous experiences with reviewing hundreds of consultative examinations, I doubt if an HMO or large health care provider will increase the quality of testing and/or reporting of medical conditions for disability claimants. Yet the situation is so bad, anything should be an improvement. If negotiated well, this should be a boon to disability claimants who are medically underserved in the Chicago area.

13. I applaud use of electronic processing of both the appeals process and the gathering of evidence (pages 20-21). The elimination of reconsideration and the installation of an "adjudication officer" should be a welcome change. The key to the success of such changes will rest in the selection of qualified adjudication officers and disability claims managers. Essentially, the ALJ will have one less hat to wear.

Q. Recently, SSA implemented a procedure for filing complaints against ALJs. Will this procedure become available against adjudication officers? Against a disability claim manager?

14. Going from the ALJ to U.S. Court will not help either the Appeals Council nor the U.S. District Courts. I can guarantee that both will be busier and approach the record filing levels of the early 80s.

15. Quality Assurance was a previously stated goal of SSA. How does this "redesign" change the existing "design"? Were there no "quality standards" before 4/94? Was there no "systematic review" before 4/94? Is there no "national training program" for current adjudicators? Who will set the "performance evaluations" based on "national quality standards"? Are adjudicators not given leave at the present time for "continuing education"? Will bad managers be responsible for

bad employees? Will District Offices with high application rates be given more resources (i.e., "combat pay")? (i.e., high tech priority?)

Thank you for the opportunity to submit my initial comments, considerations and questions.

Management must get control of a system in disorder. This is a start.

Respectfully,

David R. Bryant

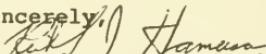
DRB:paz
cc: Hon. Dan Rostenkowski
cc: Rudolph Patterson, Esquire, ABA
cc: Nancy Shor, NOSSCR
cc: Nancy Katz, CBA
cc: Gary Wild, Esquire
cc: Thomas Henry, Esquire

RE: Disability Process Redesign

The "Disability Process Redesign" proposes, among numerous other things, to do away with the role of vocational experts(VE's) since the SSA will no longer rely on medical-vocational guidelines. We strongly object to this abrupt and ill-advised move. It appears that in proposing this change, no information was sought from VE's. The Chicago Area Vocational Expert Association polled its membership in all the Great Lakes States(Great Lakes Region) and not one member was approached for comments or ideas. It also appears that some of the interviews that were conducted by the team were conducted with people external to SSA and DDS's but no VE's. In fact, most VE's(and ME's) were totally unaware of the disability process design while both VE's and ME's roles were part of the legislation affecting the disability process. It further appears that no vocational specialists were on the redesign team.

The disability process redesign is contradictory to the intent of the disability act which presently considers the claimant's age, education and experience(work). All of these real issues plus any non-exertional factors such as: attention/concentration, pain, persistence/pace, postural considerations, environmental considerations can not simply "fit" under a single rule. The vocational expert, who has both the training and experience in dealing with these issues, is the only one who is in the best position to consider all the factors and their impact on the claimant's ability to perform substantial gainful activity. Who is going to provide this necessary input so that a fair and impartial decision will be made for the claimant? SSA's philosophy has always been to treat each case on its own merits and a good proportion of that was based on vocational factors. Is this position to be totally abandoned at the hearing level now?

In essence, we categorically oppose the proposal's intent to do away with the role of the VE's. The profession of vocational expert has grown with the Office of Hearings and Appeals and has contributed greatly in considering all factors for fair and impartial decisions. We look forward to continuing to offer our professional services in the future.

Sincerely,

Richard J. Hamersma, Ph.D.
Board Certified Vocational Expert
President, Chicago Area Vocational
Experts Association

May 2, 1994

SSA - Disability Reengineering Project
P.O. Box 17052
Baltimore, Maryland 21235

A brief description of my experience in the Disability Program will provide a context for my comments. I have been employed at the Georgia DDS for approximately 18 years. During that time I have adjudicated initial, reconsideration and CDR claims. I have been a Unit Supervisor in an Initial/Recon and in a CDR unit. I have served as an Operations Manager with responsibility for one quarter of the claims processed in Georgia. I had management responsibility for six unit supervisors, thirty-five adjudicators, twenty medical consultants and clerical support staff. For the last year I have had management responsibility for the Quality Assurance Unit, the Training Unit, and Policy.

I was on the Board of the National Association of Disability Examiners (NADE) while the 1984 reforms were being considered. I was President of NADE when those reforms were implemented. I have written and presented testimony to various congressional committees. For the past five years, I have served on the NADE Legislative Committee providing input on most of that organization's testimony. I have served on various work groups at the regional and national level. NADE's efforts to secure from the Social Security Administration guidance regarding the vocational implications of mental residual functional capacity in 1985-86 culminated in a work group which wrote the current POMS in this area. As NADE President, I was asked to select the state agency vocational consultants which served on that work group. Through these efforts in NADE and in the Disability Determination Service, I have had a high level of involvement in vocational issues. I have attended multiple regional and national meetings regarding vocational issues.

I support the reengineering effort. It is unconscionable to have continuing backlogs which deprive disabled citizens of a fair and timely decision. It is equally unconscionable to continue to pay individuals whose disability has ceased because the continuing disability review process has been stalled. The proposal which has been offered, however, seems to be largely a compilation of assumptions, wishful thinking and internal contradictions. I do not think that the reengineering work group was sufficiently broad-based to create a workable proposal. While DDS's decide approximately seven claims for each claim decided by OHA, OHA

representatives outnumbered DDS representatives two to one (or four to one depending on how you count the DDS MC whose primary career is as a physician.) The proposed enhancements to the appeals process, offered, it seems, to the detriment of the initial decision maker, seem to be a prescription for continuing backlogs rather than a strengthening of the initial decision making which will allow timely, accurate decisions at the earliest time.

Claim Manager. Currently, claims are taken in the Field Office by a Title II or Title XVI claims representative. While this specialization may not be universal, it is certainly widespread. We are told that this is in recognition of the complexity of each of these type claims. The file is then developed and decided by Disability Adjudicators with extensive medical input often required by regulations or statute. The new process envisions a single individual taking claims on both Title II and Title XVI and developing and adjudicating the claim with limited medical input. While I agree with any effort to reduce mandated medical input on a case, it should be recognized that this would increase the complexity for the decision maker. The SSA may be able to simplify all of these processes in such a way as to make it possible for one individual to perform them. If, however, the reverse turns out to be true, the resulting cost to claimants and to taxpayers will be quite high.

The proposal seems to be divided against itself in its discussion of the claim manager. While it is an objective of reengineering to provide accurate and timely decision making at the initial level, the capacity of the claim manager to do that is being gutted by the level of complexity of the position. Further, the administrative law judge position is being enhanced by the addition of an adjudicative officer. This back loading of the process seems at odds with reengineering's stated objective.

If there is a single study which shows that the kind of decision making required for disability adjudication is enhanced by face-to-face contact, I know of no one who has seen it. In fact, there is substantial evidence that face-to-face contact opens the door to bias and subjectivity which can disadvantage deserving claimants and give advantage to undeserving ones. The objective decision making process which values consistency and replication of outcomes, though often under fire, does provide one of the most fundamental philosophical and political justifications for the program. Individuals are not treated differently based on the statements of their physicians nor the impression they make on a decision maker. Rather, objective medical evidence provides the underpinning for the process. The fact that this has been substantially eroded does not justify its being discarded.

Four-Step Evaluation Process. It seems that virtually all of the integrity of the decision making process has been transferred to the final step, i.e., consideration of the functional ability to perform substantial gainful activity. By creating an abbreviated Index of Disabling Impairments to replace the more extensive and more nearly complete Listing of Impairments, fewer individuals will be screened in for very severe impairments. By eliminating altogether the concept of medical equivalency, application of the Index will be mechanical without opportunity to assess other individuals whose impairments are equally severe but were not included in the Index. Consequently, the preponderance of decisions will be made under a process - the functional ability to perform substantial gainful activity - that, as yet, is not developed and, therefore, not tested.

The assumptions inherent in proposing this methodology should cause extensive concern. First, there is no reason to believe that SSA can develop a system such as this which will be equitable. Even when the information needed is already available from other sources such as the nature of medical impairments or the requirements of jobs as found in the Dictionary of Occupational Titles, the SSA still has substantial difficulty in developing and applying policy. Starting from scratch, as is necessary for this procedure, challenges the imagination of those who have observed SSA closely over the years. It is incumbent on interested parties to make every effort to require that SSA actually prove, rather than assume, that it can develop such a methodology, before proceeding further.

It is also assumed that treating physicians, hospitals, and other institutions involved in the treatment of patients will introduce new methods of recording medical evidence to accommodate SSA's requirements. There is absolutely no evidence that the treating community has ever adopted itself to any of SSA's requirements. Why, after repeated failures by the SSA to convince medical practitioners that SSA's needs are somehow important to individuals and institutions treating people who are ill, this lesson could not be learned is difficult to determine. Since the whole process hinges on this, it is chilling to contemplate the consequences of this process being adopted and the potential for failure.

The intention to request the statement of function from treating sources and have them attest to an ability to base those functional assessments on evidence in file when requested to do so defies description. Since any assessment of function is largely subjective and since no criteria exist for determining function from medical facts, a statement that medical evidence backs up an assessment of function is meaningless. Additionally, early statements by

ALJ's that they will not rely on functional assessments without supporting medical evidence suggests that an even wider chasm will be opened between initial decisions and ALJ decisions. The program cannot continue to support this discrepancy.

General. Many of the objectives of reengineering are laudable and it is easy to agree with many of the stated outcomes of the new process. What is not readily discernible, however, is why SSA is not able to implement these reforms without extensive, potentially disruptive organizational restructuring or adopting an untested sequence of evaluation. Further, if the SSA is not able to make such reforms at the current time, what is inherent in reengineering that will make them able to do so later. Examples of laudable outcomes which should be implemented independent of reengineering are:

- Making the claimant a partner in obtaining medical evidence.
- Working with medical experts to develop standardized instruments and criteria for measuring a claimant's functional ability. This would be invaluable in RFC assessment.
- Providing the claimant program information, starter application and means to gather evidence before entry.
- Providing transportation and escort services for indigent claimants and others who have difficulty in attending consultative examinations.
- Enhancement of medical provider's capacity to identify potentially eligible patients.
- Access expert advice to share data bases thus eliminating the need to transfer files [unnecessarily].
- Effectuate payment quickly.
- **Provide meaningful, timely consistent policy.**
- Provide intelligible notices.

This letter reflects a great deal of skepticism regarding the SSA's ability to provide the necessary ingredients to make the reengineering proposal workable. Eight years after implementation of the 1984 reforms, after repeated requests by the DDS and Regional Offices, the SSA still has not provided a single example of the kind of narrative mental residual functional capacity which is meaningful to an adjudicator trying to understand the vocational implications of mental RFC. In a similar fashion, the existing instruct-

ions on the vocational implications of MRFC though grossly inadequate, have never been clarified. Persistent efforts to obtain better policy have failed.

Months after implementation of the new Respiratory and Cardiovascular Listings questions go unanswered. Large bodies of policy which perhaps were obviated by these new Listings remains in effect without comment by the SSA. Recent Disability Digest issuances conflict with the Listings, the regulations, and existing policy. Sometimes, they even conflict with themselves. While the Reengineering Team seems to envision these kinds of problems being solved by their proposal, many of us who have responsibility for actually implementing SSA initiatives fear, instead, that these problems will be exponentially magnified. Dealing with totally new methodologies, given SSA's record for providing meaningful training and policy, is a source of extreme consternation in DDS's at this time.

Thank you for the opportunity to comment.

Sincerely,



Michael Foster

Addendum: After preparing these comments I received and reviewed the questions and answers from the Reengineering Commentline at CO, dated 4/29/94. Even though there is substantial remaining time in the comment period, I find that, already, staff at SSA has dismissed most of the concerns in my letter. Clearly, many of these are concerns of a large number of people. The difficult and complex questions and the legitimate concerns of individuals involved in the disability program are dealt with in that document by the facile and dismissive approach that often seems to characterize SSA's documents. While it is perhaps understandable that the SSA will be more interested in defending their proposal than explaining it or fully developing it at this time, I can only hope that when the real work of implementation begins that this tone and air of superficiality and glibness will not permeate that work as it has the questions and answers.

Ms. Janice Mays
Chief Counsel and Staff Director
Committee on Ways and Means
U. S. House of Representatives
1102 Longworth House Office Building
Washington, D. C. 20515

Dear Ms. Mays:

The Humboldt Alliance for the Mentally Ill is a support group for persons having a mentally ill relative and the writer is a founding member of this organization. The issues of determining eligibility for benefits and their dispensing is of major concern to us all. Our position may reflect a different perspective from that of the Commission but we believe it deserves consideration.

First, in the absence of a physiological test to "diagnose" mental illness (as well as alcoholism and drug addiction) clinical observations of appearance and behavior over a period of time are generally utilized. These come from, presumably, educated and skilled professionals who act as gatekeepers for the eligibility process. There needs to be some responsibility assumed at the "gate" for follow-up after passing this stage of the process. As an example, my son, now 41 years old, was assisted in his application for SSDI benefits when he was first admitted to Napa State Hospital in 1975. He was there briefly, discharged to a community where there was no case management to those who did not seek this aggressively. Only after a number of chaotic years did he begin taking medication which stabilized his life to the extent that he could effectively use his benefits.

Second, an expectation that treatment, rehabilitation, and placement will be accepted by the recipient of benefits should be a condition of eligibility approval. Responsibility for this is no less important than the determination that the condition indeed exists. Mentally ill people may be too deranged at the time of application for this to be reasonably expected in entirety. A review periodically is not unreasonable. Mental illness, DA and A most commonly show onset in young adulthood. How many of these people become "disabled" in their own and the minds of others? They usually become lost souls, forever dependent, poor and often despised by many. The complexity of this expectation is acknowledged, but the human and monetary loss demand it.

Third, benefits should not go directly to any of the mentally ill, DA and A recipients until they can prove themselves capable of responsible money management. From my personal experience and extensive reading of professional material I know that many have a "dual diagnosis" and are both mentally ill and drug abusers. Unless coded as DA or A, the recipient not under conservatorship gets benefits directly. Many families know extreme poor judgement in money management to be a major problem, yet have difficulty in effecting a change in payee status.

In summary, all people who, because of disability, are unable to work should have some assistance. However, particularly if they have a substantial number of work years in the future, treatment, training and placement in paid or volunteer work within their capacity should be required. The writer recently met a 24 year old man, just released from a year's commitment to state prison for drug treatment. He was awaiting a "catch-up" check from his pending disability benefits application. No question about his drug addiction; he began smoking pot at eight, graduated to more exotic drugs which he obtained via shoplifting, forgery, burglary, etc. Lots of convictions; high school dropout; couldn't support himself and girl friend on minimum wage which in our high unemployment economy was the best he could do. Shannon is still on parole and now that he's on disability, any work he does will strictly be off the books.

I could expand on the above topic but will close with a quote from Dr. Gary A Jaeger who has many years of experience working particularly with DA and A clients. He says "My very strong impression is that when SSI is given because of alcoholism or addiction problems, it is counter productive. By this I mean that it actually contributes to the continued addiction and chaos of the individual involved in most cases. I clearly support the concept of SSI for people with other disabilities, but I continue to feel very strongly that in the case of addiction and alcoholism, it is a counter productive policy. I would argue that it should be reevaluated and considered for discontinuation."

Sincerely yours,

Sara M. Turner

Sara M. Turner
Humboldt Alliance for the Mentally Ill

Attachments:

Letter from Dr. Jaeger

Personal resume



ST. JOSEPH HOSPITAL

A Sisters of St. Joseph of Orange Corporation

December 14, 1993

Sara M. Turner, A.M., A.C.S.W.
 Professor Emeritus
 Department of Sociology,
 Anthropology and Social Work
 Humboldt State University
 Arcata, CA 95521-4957

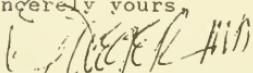
Dear Ms. Turner:

This letter is intended to be a follow up to our discussion of a couple of weeks back regarding Social Security SSI and addiction problems. My own background is as a Board certified Family Physician who is also certified as a specialist in addiction medicine and I have spent the last five years working extensively with people with addiction problems.

My very strong impression is that when SSI is given because of alcoholism or addiction problems, it is counter productive. By this I mean that it actually contributes to the continued addiction and chaos of the individual involved in most cases. I clearly support the concept of SSI for people with other disabilities, but I continue to feel very strongly that in the case of addiction and alcoholism, it is a counter productive policy. I would argue that it should be reevaluated and considered for discontinuation.

I'm currently in the process of leaving my position as Medical Director with Family Recovery Services at St. Joseph Hospital and assuming the position of Chief of Addiction Medicine at the Harbor City Hospital of Southern California, Kaiser Permanente Medical Group. Should there be additional questions regarding this issue I can be reached at the following address:

Carson Chemical Dependency Recovery Program
 23621 S. Main Street
 Carson, CA 90745

Sincerely yours,

 Gary A. Jaeger, M.D.
 Medical Director
 Family Recovery Services

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Social Security Disability
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April 26, 1994

Ms. Janice Mays
Chief Counsel and Staff Director
Committee on Ways and Means
U. S. House of Representatives
1102 Longworth - House Office Building
Washington, D. C. 20515

Re: Social Security disability re-engineering proposal

Gentlemen:

In this letter, I am respectfully submitting my comments and concerns regarding the report and proposal from the SSA Disability Process Re-engineering Team.

My legal practice has been concentrated exclusively in the area of Social Security disability law for over twelve years. During that time, I have represented several thousand claimants and have developed an excellent understanding of the process which is used to evaluate claims. I am currently vice-chair of the Chicago Bar Association Sub-committee on Social Security Law and will assume the chairmanship of this Sub-committee this autumn. My colleagues who practice in this area and our clients are extremely concerned over the direction the Social Security Administration appears to be headed relative to disability claims. These statements are submitted on behalf of my 900+ current clients and 3,000+ former clients.

Many of us believe that re-engineering started out with good intentions but has become a kind of "Trojan Horse." The much publicized procedural changes will make the claims process more user friendly and timely. Lurking beneath the pretty exterior are, however, major modifications in the way decisions are reached. These modifications, if adopted, will result in denial of many, many claims which would be approved under current law and regulation. These proposed substantive changes were not acknowledged in the press materials released with the report.

There is no question that the process currently in place has serious problems. This is not at all surprising considering the explosion of claims filed, coupled with the cutbacks in Social Security personnel. In general, I am in favor of many of the procedural changes recommended by the Re-engineering Team. I am, however, very disturbed by certain substantive changes in the team's report.

Initially, I submit that there is no reason whatsoever to change the substantive methodology of determining disability. The Social Security Act requires that the claimant's age, education, and inability to perform prior work experience be considered. The current five-step sequential evaluation works extremely well in adjudicating disability. The public comments discussed in the report do not express any dissatisfaction with this framework. See Report at pp. 19-20. It is my conclusion that the re-engineering team's substantive changes are designed with the primary purpose of denying many of the claims which would currently be approved under existing law.

The re-engineering team proposes to do away with the following elements of the decision-making process which will disqualify otherwise eligible claims:

1. A claimant's condition(s) can no longer meet the Listings of Impairments;
2. A claimant's condition(s) can no longer equal the Listings of Impairments;
3. The "Grid" will no longer be used to account for advancing age, educational factors, or inability to perform prior work;
4. Vocational experts will no longer be utilized to identify whether work exists in the national economy that a claimant can perform.

Each of these changes will be discussed below.

Elimination of Listings of Impairments

Under current law and regulation, a claimant is to be found disabled if his condition meets the criteria of the Listings of Impairments. The purpose of the Listings of Impairments is to describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. 20 C.F.R. Section 404.1525(a). Under the Listings, a diagnosis of a condition is not dispositive of disability. Rather, the **severity** of the condition is evaluated, often using medical documentation such as X-rays, pulmonary function studies, ECG tracings, and frequency of incident (e.g., seizures, asthma attacks requiring emergency room treatment, frequency of blood transfusion). X-rays are used to determine the degree of bone destruction, heart enlargement, digestive obstructions, etc. Accordingly, the Listings are used where an impairment(s) (arthritis, asthma, heart disease, digestive disease, anemia, etc.) meets the requisite degree of severity. The Listings are used also in mental impairments to establish the particular diagnosis (e.g., depression, anxiety, personality disorder, etc.). A Listing is not met unless the claimant's ability to function is seriously impaired by the mental impairment(s). See 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 12.00(A) Introduction.

Disability may also be established where a non-listed impairment is medically equivalent in severity and duration to a listed impairment.

The Re-engineering Team proposes to get rid of the Listings in favor of an "Index" of disabling impairments. According to the report, the Index will contain fewer impairments and have less detail and complexity. The "Index will describe impairments that will result in death or impairments that are so debilitating that any individual would be unable to engage in substantial gainful activity regardless of any reasonable accommodations that an employer might make in accordance with the Americans With Disabilities Act." Report at page 39. The Team does not identify what conditions will appear in the Index. It is clear only that the Index will have fewer impairments, thereby obviously allowing for less findings of disability at this step of the sequential evaluation.

It is widely believed among SSI/Disability practitioners that the Index will be comparable to the current list of "presumptive disability" impairments currently found at 20 C.F.R. Section 416.934. Under this Section, there may be a finding of presumptive disability under the SSI program where there are impairments such as: Amputation of two limbs, allegation of total blindness or deafness, allegation of a stroke with continued marked difficulty in walking or using a hand or arm, allegation of Down Syndrome, etc.

The emphasis at Step 3 of the sequential evaluation, whether Listed or Indexed, should be its severity. While simplification of the process is a laudable goal, it should not interfere with the decision-maker's ability to assess the severity of a condition. The "dumbing-down" of the Listings does not benefit the claimant. Elimination of the Listings can only result in the denial of additional claims which would be approved under the current system. If the "presumptive disability" standard serves as the new Index, it is likely that claimants suffering from uncontrolled epilepsy, chronic obstructive pulmonary disease and severe heart disease, to name a few impairments covered by the current Listings, will be denied disability due to their seeming ability to perform "baseline" (ie., sedentary) work.

The Team also states that the Social Security Administration will no longer use the concept of medical evidence in relation to the Index. Page 39. The change will serve to cull out additional otherwise favorable decisions.

Abolition of the Grid

The Medical-Vocational Guidelines, commonly known as the "Grid" are a proven way of factoring a claimant's age, education, and work experience into the decision-making process. The Grid rules are weighted in favor of a claimant who is 50 (if illiterate or unable to communicate in English, 45 years of age). Also, persons with limited education and lack of job skills are also more likely to receive a favorable decision under the Grid. Through the Grid, for example, a 57-year-old claimant with a 7th-grade education who is unable to perform his past relevant work will be found disabled even if he has the capacity to perform sedentary or light work under the Grid. The Grid factors in various vocational factors in combination with the individual's residual functional capacity in evaluating his ability to engage in substantial gainful activity. See 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00(a).

Under the re-engineered analysis, with very minor exceptions, the SSA will evaluate only an individual's ability to perform substantial gainful activity. The SSA will establish a "baseline" of occupational demands needed to perform SGA. "In the current process, an example of 'baseline' criteria are the functional requirements of unskilled, sedentary work." Re-engineering Report at page 42. This is the most disturbing aspect of the team's proposal. The only concession to age under the Team's plan will be for individuals who are nearing full retirement. "Individuals nearing full retirement age cannot be expected to make a vocational adjustment to work other than work they performed in the recent past." Report at page 44. However, for individuals with no past work, the "nearing full retirement" claimant will be found not disabled if he is capable of performing the baseline work. Hence, only a formerly employed claimant who is nearing full retirement age will receive any consideration of the statute's requisite consideration of age.

Similarly, the Team does not believe that education is important because the baseline will encompass only unskilled work. "Thus, additional formal education will have little impact on an individual's ability to perform the baseline of occupational demands." Report at page 45.

The above approach of the Re-engineering Team is extremely worrisome. It is the clearest example of the Team's intention to deny more disability claims. Ironically, the claimants most adversely affected by the proposed changes would be those who are most worthy: those who have paid longest into the Social Security system and those who are least capable of making a vocational adjustment to the workplace, such as the widowed housewife who had always depended upon her husband for financial support and had never worked.

The baseline contemplated by the Re-engineering Team is extremely unrealistic given today's job market. Unskilled sedentary jobs (e.g., manufacturing, assembly, etc.) have been steadily shrinking as the economy has become more service-oriented. It is ludicrous to believe that education, and especially literacy, are unimportant in today's job market. The utilization of the baseline approach will result in the denial of many claims which would have been approved under the current system.

The baseline approach to mental impairments is extremely disturbing, as well. The mental ability to understand and carry out simple instructions does not necessarily indicate an ability to perform substantial gainful work activity on a sustained basis. In my experience, the vast majority of mentally impaired claimants have the capacity to do unskilled tasks. *Sometimes*. The primary problems of such claimants involve related but different issues. Is the claimant significantly impaired in his ability to work around other people? How does the claimant respond to criticism from supervisors? Can the claimant sustain attentiveness and concentration? Is the claimant limited in his ability to complete a normal workday and workweek without an excessive number of interruptions due to problems from psychologically-based symptoms? Is he able to perform at a consistent pace without an unreasonable number and length of rest periods? Can the claimant sustain an ordinary routine without special supervision? These questions are extremely important in determining whether a claimant could be a productive worker. If there are significant restrictions in these and other "mental residual functional capacity" areas, such an individual cannot sustain work even with the ability to complete simple tasks at times. Under the current system, each case is looked at individually to determine the functional restrictions imposed by the claimant's impairments. Under the baseline approach, there does not appear to be this sort of scrutiny to reach a fair decision of a claimant's ability to do substantial gainful work activity. Again, the Re-engineering Team's approach appears designed toward denial of additional mental impairment claims.

Elimination of Vocational Expert Testimony

At page 43, the Team states that "SSA will no longer rely on the Medical-Vocational Guidelines and/or expert testimony to identify whether work exists in the national economy that the claimant can perform." There does not appear to be any basis for the elimination of vocational expert testimony. A claimant's ability to work may be affected by numerous variables which could not possibly be encompassed in a general "baseline". For example, an epileptic who experiences several seizures per month ordinarily cannot sustain work, according to vocational expert testimony. Under the new approach, since the claimant could physically carry out simple, unskilled work at the sedentary exertional level, he would now be denied benefits, especially since vocational expert

testimony would not be permissible. Another example would be a claimant who can sit or stand for thirty minutes at a time due to a back impairment but needs to lay down intermittently to relieve his pain. Without vocational expert testimony, it is unclear whether such a person meets the baseline definition of sedentary work.

Where a claimant's pain affects his ability to concentrate, how many errors will be tolerated by the employer? What if the worker needs to take extra breaks -- how many would be tolerated in the workplace? How often is a claimant allowed to be tardy where his mental impairment presents difficulties in keeping to a schedule? These and many other issues can often only be resolved with vocational expert testimony. Such testimony is used to establish whether or not jobs exist in significant numbers within the claimant's residual functional capacity. By eliminating such testimony, once again the Team proposes to make it more difficult to qualify for disability benefits.

Many Proposed Changes Are Based Upon Vague or Unlikely Premises

The Social Security Re-engineering Team has proposed to do away with a system of adjudicating disability which has served the public in an overall fair and equitable manner. The Team has proposed a replacement analysis which is undefined as of now. As has been pointed out to me by a Social Security administrative law judge, the Team has not definitively set the level of baseline work. The ALJ stated that perhaps the baseline would be set at less than light work. I have a great deal of difficulty believing that this is the direction the Administration is headed toward. Utilization of the baseline approach will treat younger individuals the same as older persons who are not yet nearing full retirement age. In other words, the standard would be the same for a 20 year old as a 60 year old. It is very unlikely that the Administration or the general public wishes to allow disability benefits to younger individuals who can still perform sedentary work.¹

There are other vagaries in the report which concern me. There are repeated references to the Americans with Disabilities Act (ADA) in evaluating claims under the baseline step of the proposed sequential evaluation. The ADA is in its infancy. The ADA appears primarily to be an anti-discrimination statute to remove barriers which would prevent qualified individuals with disabilities from enjoying employment opportunities available to other persons. I am not aware of any major study which has established that the ADA will allow otherwise disabled persons to re-enter the workplace in spite of their disabilities. The Social Security disability statute has a different purpose than the ADA. Clearly, the vast majority of claimants seeking disability benefits are unable to engage in substantial work activity as opposed to having been denied opportunities to work due to their impairments.

¹ If the baseline is set at less than the sedentary exertional level, there will be disasterous effects for older claimants. I analyzed those cases in my office which would be affected by elimination of the grid. Each case sampled involved a claimant who was at least 50 years of age and who had received a favorable decision on the basis of physical (not mental) impairments. Out of a random sample of 69 such cases, nearly two thirds (43) were awarded disability based upon application of the grid. An additional five were found disabled under the Listings. The remaining claims were awarded on the basis of a "less than sedentary" residual functional capacity. Application of the baseline would have changed the decision in about two thirds of these cases and would have resulted in a denial of the disability claim.

I am somewhat skeptical of the Team's belief that "SSA will develop instruments that provide a standardized measure of functional ability." In the report, the Team makes the statement: "ultimately, documenting functional ability will become the routine practice of physicians and other health care professionals, such that a functional assessment with history and descriptive medical findings will become an accepted component of a standard medical report." (see Report at page 41) As someone who has dealt routinely with overworked and understaffed clinics and knows firsthand the difficulty in obtaining reports from treating sources, I must confess extreme scepticism of the viability of the Team's goal. One of the most valuable roles an attorney plays in the disability process is to make sure that "all bases are covered" in assessing the claimant's individual functional limitations. A standardized form often misses important aspects of this evaluation. While standardization is a worthwhile goal in general, one size does not fit all.

Restriction of Appeals Council Review

There is an important procedural change which also appears geared toward rejection of more claims. A claimant may no longer request review by the Appeals Council of an unfavorable decision. On initial (non-termination) claims in fiscal year 1992, the Appeals Council remanded nearly one-third of all cases appealed and allowed an additional four percent. Ways and Means Committee Print, 103-18, July 7, 1993. Under the proposed changes, the Appeals Council will become inaccessible to claimants except as a screen when a federal lawsuit for judicial review is filed. However, the Appeals Council will have the power to review ALJ decisions on its own motion. In the early 1980s, the Appeals Council conducted "own motion" review of numerous decisions of administrative law judges. Nearly every decision reviewed by the Appeals Council had been favorably determined by the ALJ. The Appeals Council was not reviewing ALJ denials with an eye toward ordering a new hearing or an award of benefits.

As an attorney who practiced in this area during that era, I remember well the frustrations of my clients who had been seemingly approved for disability benefits only to have their hopes dashed by the Appeals Council's own-motion review. Other practitioners in this area similarly recall that own-motion review by the Appeals Council was a "one-way street", geared only toward rejecting ALJ favorable decisions. In response to severe criticism by the public and Congress, own-motion review has been virtually unheard-of since the mid-1980s. With the above-described history of own-motion review, it seems extremely unfair for the Appeals Council to retain its right to reject an ALJ allowance while the claimant can no longer have the Council review an ALJ denial. I would have no objection if the Appeals Council stage of the process is eliminated altogether. Under the Team's proposal, the Appeals Council process change seems stacked against the claimant. Appeals Council review should be a two-way process if it is to exist at all.

Conclusion

The Re-engineering Report fails to satisfactorily explain why substantive changes are necessary. The current sequential analysis is proven well established and equitable. It should not be replaced. The Team proposes procedural changes which could prove extremely beneficial, including abolition of reconsideration and the concept of claims managers and adjudication officers. It is my belief that the procedural changes would be welcomed by the public and disability advocacy community. I would hope that the Social Security Administration allows more public debate before promulgating any far reaching changes.

Thank you very much for your attention and consideration of these matters.

Respectfully submitted,

Jan L. Kodner

JLK/mel

235 Kathryn Avenue
Decatur, GA. 30030
May 4, 1994

Ms Janice Mays
Chief Counsel & Staff Director
Committee on Ways & Means
Room 1102, Longworth
H. O. B.
Washington, D.C. 20515

Dear Ms. Mays:

As a twenty-one (21) year veteran of the Georgia Disability Determination Section, I am submitting the attached comments for inclusion in the record of the Hearing held before the SSA Subcommittee on 4/14/94. I would appreciate the Subcommittee's review of the comments.

I do not doubt the good intentions and desires of SSA Reengineering Team. My experience, however, leads me to believe that assertions regarding the price of implementation are not totally reality-based. I have witnessed any number of initiatives in the program billed as revenue-neutral which turned out to be anything but that.

My hope is that much thought and analysis will go into any changes in the disability program. As you know, change simply for change's sake is not necessarily good. Any change should be bench-marked against quality public service as well as good stewardship of public monies.

Thank you for your consideration.

Sincerely,


Bruce Johnston

BJ:ke
Enclosures (8)

P.S. I am sending this even though I understand the SSA Com. has already said implementation will proceed swiftly, so I wonder why we haven't had a comment period. Business as usual! Thank you.
Bruce

"There's nothing new under the sun" is one cliche that applies to aspects of SSA's Disability Process Redesign. What was touted as a "dramatically improved disability claim process" in some respects resembles the disability program of decades ago.

The proposal would replace the current Listing of Impairments with an "Index of Disabling Impairments." Old timers in the disability program have remarked that the concept of an Index is much akin to the medical criteria used at the birth of the Disability Program before the Listings were promulgated. Medical conditions were outlined in the DDS manual (Disability Insurance State Manual, DISM, which preceded the POMS.) These medical criteria were simple, straightforward, and understandable to lay persons - goals, likewise, envisioned for the "Index." (See DI 34101.005 & .010)

The engineering team proposes that the eligibility concept be replaced by a certification approach. SSA will develop a standardized reporting format for treating sources to use, providing diagnostic and functional assessment information on a single form. This approach can be likened to the old county welfare program in which treating sources assessed their patients as being "permanently and totally disabled." A certification process puts the dispersing of public funds into the hands of treating sources who frequently, if not always, have a vested interest in seeing their patients obtain a steady source of income. A certification process also eliminates (or at the very least makes it extremely unlikely) that there will be consistency in the decision-making. SSA already comes under fire for having different adjudicative standards. A certification process can only magnify that problem. Interestingly enough several countries have tried and later abandoned the certification approach. A certification program, especially one which encourages organizations to assist in the application process, seems ripe for fraud and abuse. SSA is already concerned over some organizations (and even treating physicians) manipulating facts to create un-warranted allowances.

Many of the problems encountered in the current disability program have arisen from successful court challenges to SSA Regulations, policies, and procedures. One only has to say the word Zebley to realize the truth of that assertion. Yet the reengineering team has chosen to recommend elimination of two SSA concepts that the Courts have repeatedly upheld as valid. The proposal mentions nothing about changing areas in which SSA seems quite vulnerable to challenge.

The threshold of severity (non-severe) concept has withstood challenge throughout the years. This step in sequential evaluation enables a "customer" to have a substantive review of his/her medical conditions. The development standards (12 months' medical history, contacting all sources, soliciting TP opinions and assessments, etc.) attend in such cases. A "customer" does not run the risk of having his claim denied by a claims manager at an intake interview. Determination of non-severe is made after full consideration of all factors - not before as this proposal suggests. One also wonders what would happen with multiple non-severe impairments.

The Vocational Rules have, likewise, withstood court challenges. While the Vocational Rules do present some adjudicative problems, the problems do not appear to be significant enough to jettison what took years to perfect and implement. The new approach of "identifying baseline occupational demands" appears to encompass many of the assumptions in the Vocational Grid and, because of this, one is left to wonder why the Grid needs to be replaced. One aspect of the baseline demands that is troubling is that such baseline will consider "any reasonable accommodations that employers are expected to make under the Americans with Disabilities Act." It is my understanding of ADA that reasonable accommodations are to be made based on the

individual needs of a person with a disability. It sounds as if SSA plans to structure in certain "reasonable accomodations" without regard to individual needs and the resulting ability to engage in SGA by means of accommodation.

The reengineering proposal calls for the development of a standardized instrument to measure functional abilities. The report says "documenting functional ability will become the routine practice of physicians and other health care professionals, such that a functional assessment... will become an accepted component of a standard medical report."

An historical perspective may be of benefit here. Before the current mental impairment Listings, (with their heavy emphasis on functional material,) were implemented, disability professionals tried to tell SSA how difficult it would be to obtain functional material. Many people pointed out the mental health professionals did not gather nor record very much in the way of "B" criteria . SSA's position then was that once our (SSA's) needs were known in the treating community that treatment providers would begin to record and maintain "B" criteria information. We are now roughly 10 years into the new mental regulations and I have yet to see functional material routinely maintained by any treatment providers. There is little, if any, reason to believe that busy practitioners are going to alter their record-keeping practices to include information that will be needed for only a small fraction of people they treat.

While a national fee for MEOR has value, a "sliding scale" of payment based on timeliness betrays an ignorance of the treating community's priorities and indeed, could be viewed as insulting. Currently many medical practices have clerical people who photocopy records requiring little actual physician time to complete DDS requests. Requiring a standardized forms' completion will, it appears, require more physician time and, consequently be more rather than less expensive. Some of the redesign's assumptions about the treating community seem specious; it would be easier to accept if members of the treating community had been involved in the re-design.

A more likely outcome based on national experience with the mental regulations (and other impairments as well) is that functional material will have to be obtained from sources other than treating ones - namely, claimants, interested third parties, potentially consultative exams and workshop-type evaluations. Creating functional evidence is one of the factors that has increased disability processing time over the past years. Until and unless SSA can develop a form, obtaining functional information will require more effort from claimants, claimants who are sick and suffer from lack of stamina and easy fatigability.

The reengineering proposal eliminates the concept of medical equivalence in adjudicating claims. Listings incorporating the disabling nature of AIDS went into effect in July, 1993. One has to wonder how many people infected with HIV would have been denied benefits had there not been the concept of medical equivalence in place as a safety net for those whose impairments do not neatly fit into SSA's pigeon holes.

Certain aspects of the proposal seem to believe that the decision to file a disability claim and the decision to appeal an initially unfavorable decision is a rational one. SSA seems to think they can discourage appeals(and perhaps even initial applications) by explaining the decision well enough. Personalized denial notices were supposed to accomplish this and they have not.

Many aspects of the reengineering proposal have merit. They represent things disability professionals have been saying for years and do not require "re-engineering". They just require

effort and initiative:

- 1) SSA will develop information packets and "starter kits" for prospective applicants and interested third parties.
- 2) Having an individual explain the definition of disability and how the decision is made.
- 3) Encourage claimants to take more responsibility in claims processing.
- 4) Explain the basis for decision in clear, understandable language.
- 5) Invest in comprehensive employee training.
- 6) Provide disability program information to the public in general and targeted audiences.
- 7) Conduct meaningful outreach.
- 8) Encourage private insurers and public agencies that refer people to SSA to provide medical evidence.
- 9) Restoring medical consultants to a true consultant's role.

The redesign envisions a disability claims manager who will handle medical and non-medical eligibility adjudication. Many FO's currently specialize CR's by Title-presumably in recognition of the complexity of the job. It is difficult to imagine a disability claims manager handling the entire process - even with a simplified disability program and increased automated support.

It is very troubling that the proposal envisions incorporating increased personal contact into the process without additional staff. Experience with SSA shows us that frequently the organization woefully underestimates the resource requirements of various initiatives. Instead of adjusting resources to fit the demands, they allow the pressure to build unabated. The current state of the disability program can, in part, be attributed to an ever-growing number of initiatives that have been imposed without being adequately funded. SSA components have been left to manage the program as best they can with very limited resources and little organizational recognition of challenges met and obstacles overcome.

Despite SSA's assertion, implementation of this plan will cost more to administer than the current system. The plan purports to eliminate the reconsideration step. What it does in reality, however, is rename the step and move the step to the hands of Adjudicative Officers. Suggestions to improve the process have been made for years by knowledgeable people, yet such suggestions have fallen on deaf ears.

If producing more allowances at a lower appeals level and at lesser cost than at OHA are SSA's objectives, the mechanism exists to allow that to happen now. The DDS, a less expensive process than OHA, should be given increased latitude to allow claims. Give adjudicators discretion to make favorable decisions on more cases at a fraction of the cost of an OHA decision and in a fraction of the time. This would help relieve the backlog at OHA. The staggering administrative costs to claimant representatives (in the form of a percentage of retroactive payments) would, likewise, be reduced. Processing time would be reduced.

Rather than replacing the Listing with an abbreviated Index, expand the conditions for which a medical only decision can be made. Gathering medical evidence is more expedient and less costly in most instances than obtaining functional and vocational information. Rather than eliminating the concept of medical equivalency, strengthen it, again to allow more people on a medical only basis.

Note: All quotations are taken from the Reengineering booklet produced by SSA.

SOCIAL SECURITY'S REENGINEERING PROPOSAL

SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S HOUSE OF REPRESENTATIVES
WASHINGTON, DC

I am sorry that I am late responding to SSA's Proposal. Did you realize that SSA publicized a MAY 27 1994 deadline on comments?? Apparently the Congressional record closed in April. But sending this on to SSA, well that would be useless. PLEASE accept this for the eyes of Congress.

Although I have expertise in Social Security matters, I am declining to declare my affiliation, as my views here expressed are my own. I did work for Social Security for eight years. I have a further four years of experience in dealing with SSA. I know the nonmedical and medical requirements of both SSA and SSI as well as anyone. I also know how the more than 50 State Agencies and numerous Hearings offices work. I understand the WHOLE like few at SSA. (If SSA truly understood itself, the Reengineering Proposal would have looked quite diffrent.) I have spoken one-on-one with perhaps 10,000 claimants over the years.

Social Security is a conservative bureaucracy proposing revolutionary change. The present System does have some major flaws, but clearly, evolutionary change would be more appropriate then radical change. I am certain Congress will receive tremendous amounts of comments that accuse SSA officials of all kinds of devious plans to change the statutory definition of disability, curtail the vocational rules for those of advanced age in our society, with an eye to ward denying more claimants at the Hearing level. I hope this is not SSA's intent. However, SSA officials may not be hypocritical when they declare their intent was not to change the statute and to deny more claimants. SSA is a

prisoner of a conservative paradigm. SSA officials think they are doing the right thing. But the reality is that SSA is ill equipped to handle radical change.

It should be obvious on its face that a system that pays a higher percentage at the second appeal level, the Hearing (70%), then it does at the first two levels combined (60%), has a problem. The SSA paradigm is built around the principle that the State Agency makes the right decision the first time, and that misapplication of the Regulations results in higher award rates upon appeal. Decisions unfavorable to SSA that have accumulated at the Circuit Court level over the years are cited by judges because that is how law is made, but SSA and the State Agencies have never accepted or been trained in these rulings. I would sincerely suggest that SSA needs more Hearing level wisdom brought down to the State Agency level, and not vice versa. If one could test this by not changing a thing about the Hearing level, then success would be measured by a lower award rate at the Hearing level, because more legitimate claims would have been paid at the State Agency level.

The second major tragedy of the system is the incredible processing time. If private industry can determine eligibility for similar benefits in 30 days or less, how can SSA defend months at each of the first two levels of claim, and then a year or more at the Hearing level? Sadly, I can attest to the fact that SSA is not paying the truly disabled the first time or even the second or third time in many cases. I see denial notices from all 50 states and most of the Hearing offices. I know the medical and personal histories of these claimants. I talk to those who eventually prevail and those who fail as well. I talked one man out of taking an over-dose of his prescription medication. In other cases, homes are lost. In others, claimants die, or have higher morbidity, for lack of MEDICARE. I have seen families split up. I have calmed irates who saw the bereaved receive medical denial notices at the wake. I see at least one claim-

ant a month whose disability lasted more than 12 months who die with Social Security Disability denials on their record. I have seen judges try to deny the dead. I know of cases with four consultative exams ordered over a period of two years on the same claimant. There is no question that SSA's mindset and administrative delays cause a tremendous amount of misery in our society. I know that SSA keeps denying they do such things, but there is a lot of basis for the cynical comments this proposal will no doubt elicit. When SSA denies the legitimate claimant, you have no idea how much SSA's reputation suffers.

Consider terminal cancer for example. The listings of impairment will direct an award if the cancer is of a severe form and is inoperable, unresectable, and has spread far beyond the original organ. SSA usually waits through chemotherapy and radiation therapy that is palliative in nature, with the texts stating such things as a 3% five year survival rate. Some claimants are denied because the condition has not lasted 12 months, or is not yet demonstrated by test results to be terminal. So claimants die because of a conservative mindset COUPLED WITH long processing times. The standard is it not a condition that is EXPECTED to last 12 months? Why then does SSA so often insist on a past period of 12 months before awarding benefits?

SSA does not have their multiple levels of process on appeals just to create hurdles for the public to overcome. As SSA officials have told me, "Once you get awarded, you get awarded for life." This mindset is accurate given the current risk management practices at SSA. But if SSA developed a realistic mindset, they might gain the expertise to pay a claim the first day they see it, and then MONITOR THE DISABILITY to an early termination or actually assist with return to work.(Return to work assistance is getting scarce in our society.) When SSA undertakes it's continuous disability reviews years late, don't be surprised if the claimants who are NOT disabled, as few as they are, have developed a disability mindset. Where did SSA ever set expectations of

return to work? Most claimants who fight so hard to get on will tenaciously fight to keep their benefits. Not to mention that the standards are so tough to meet that most awards have a terminal condition or a progressive disorder that will only worsen over time. If the Reconsideration step is eliminated, the Recon branches of the State Agencies could be set reviewing cases on an ongoing basis. This would permit more realistic decisions to award benefits on the front end, with a shorter average duration of benefits, AND greater overall equity!

I originally intended to insert an idea about how to dramatically reduce processing times, award the most disabled quickly, and avoid disruptions and conflict between all the SSA bureaucracies, and to bolster the image of SSA. But I will only say this: SSA has left unanswered basic questions about who the adjudication officer and claims manager will be, since it is political dynamite, and I really get the feeling SSA will bungle very good ideas. I don't know if Congress is aware of the relationship between SSA field offices, State Agencies, and the Regional/Woodlawn SSA. The Proposal seems destined to not satisfy all parties. Consider that the SSA Field offices personnel at adjudicator level and below are unionized, and don't trust Field management or Woodlawn /Baltimore Headquarters. SSA Regional office and Woodlawn fights to control the State Agencies and for the most part, have been successful. DDS examiners, who in some cases see the paradigm they are in often want to pay claims but have limited discretion under DDS or SSA management or both. As one veteran claims examiner told me: "Common sense is not a listing." There is a workable solution that would satisfy all parties, improve processing time dramatically, and result in an improved reputation at SSA. If you care to know a possible solution, I could provide it upon request.

As the State Agency presently works, the medical listings of impairment should be the starting point, but instead most claimants who do not meet the listings are denied. The listings are so strictly defined! The standard for

blindness is near total blindness. Back disorders are rarely characterized by all the neurological deficits of listing 1.05c. For deafness, it is the inability to hear anything below 90 decibels; 82 is the most conservative statute elsewhere. Few respiratory impaired meet the listings in the few minutes after inhaling their inhalant. The treadmill test listings are so conservative that to treadmill a patient who actually meets these listings constitutes questionable judgement if not malpractice. Gastrointestinal disorders are seldom paid by the State Agency. I could continue like this through the rest of the body systems. The mindset created by these listings is one of conservatism.

SSA is proposing doing away with the concept of equivalence, when any physician can tell you there are thousands of other impairment scenarios. SSA applies the concept of equivalence in 10-15% of its initial awards. Limiting the impairments to an "Index" which are fewer and less descriptive than the 130 odd listings will result in MORE denials by State Agency examiners, not less. Remember, the mindset paradigm of the State Agency is: If it does not explicitly say you must pay the claim, then you must deny it. An odd tendency of SSA is to deny claimants that have several moderately severe impairments, as no ONE of them meets or equals a listing. Index as a term also begs the question as to what standard the INDEX references. Simplifying the listings without a change in mindset at SSA would result in higher denial rates.

SSA restates the intent to pay only claims that are medically determinable. Although there are diagnoses that are suspect, SSA has a tendency to ignore impairments and its own listings that are based upon pain or fatigue. Peripheral neuropathy in diabetes or supposedly "reproducible" fatigue in the case of multiple sclerosis are just two examples. I realize that simply accepting claimant allegation combined with attending physician certification would result in a disastrous explosion in the rolls, as in England's recent experience. However, State Agency constantly disregards proper certification of permanent disability, even when there are very strong objective findings.

State Agency, as controled by SSA is an institution that lacks human empathy. My favorite examples of this are cases involving mental retardation. SSA fought two claimants who had IQs in the 60s as adults, because their arm/hand impairments were not severe. From THEIR perspective, their arms were useless and they could no longer do things like hunt, or play the drums, or whit tle. SSA gets a really bad reputation because of it's lack of empathy, as people say: "SSA denies those who can't help themselves, like the head injured or retarded." I hear that one about once a quarter. It was not only the State Agency who denied these historic claimants. Judges denied them and SSA fought them both in the Circuit Courts for years. Doesn't SSA understand that life options with a IQ of 65 are decidedly diffrent than for a multiskilled professional? Or diffrent from the average person?

The Proposed "baseline" of occupational demands bears a strong resemblance to unskilled sedentary work. The vocational rule applying a previous work standard would only be applied to those approaching "full retirement", which implies age 60 or 62 rather than age 50 or 55. This would contradict hundreds of legal precedents established over the last 20 years. SSA is like the child that doesn't like how a game of checkers is going, and swipes all the pieces off the board as solution. Now, if Congress wants to see much higher denial rates, SSA's Proposal might do the trick. But I think SSA will face tremendous litigation if it attempts this. I do think there are some major trends in the disability field leading to greater claims volume. SSA's lack of flexibility has finally led to some major problems. If they embrace change, they may be able to pay more claims, have more denials of ongoing benefits, and save on administrative costs all at the same time.

On the brighter side, one should acknowledge that the stated intent to provide good customer service and enhance the Process is a good starting point. There have been many fine and laudable goals included in the Proposal. However,

on cannot simply dictate that "Processing time will be 45 days" without some incredible changes in mindset. It used to be that claimants would have their applications filed the same day they decided to visit a SSA office, even if they happened to bring nothing with them. The 1 (800) national number has been a problem. As far as I can tell, those manning the lines are overloaded with calls properly handled in field offices. I also suspect that those answering the phones lack field experience, and cannot be blamed for not really understanding what they are saying about entitlement and especially process.

I still think that allowing a retrograde bureaucracy radical change is dangerous. Even sophisticated companies change better by evolution rather than revolution. If SSA is allowed dramatic change with no change in mindset, the results

could be disastrous for the public, SSA, and Congress. Believe me, I know about the SSA mindset. I worked for SSA for eight years, and I smugly thought of myself as an outstanding adjudicator. Then when I left the Agency, I gradually came to realize how I was in fact a prisoner of an extremely conservative mindset. High denial rates create cynicism inside SSA.

This response is my opinion, and does not represent the views of my employer or any other party.

ROLAND L'HEUREUX

Roland L'Heureux

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LEGAL ASSISTANCE FOUNDATION OF CHICAGO

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STATEMENT OF NANCY KATZ, REBECCA SAUNDERS, AND THOMAS YATES, LEGAL ASSISTANCE FOUNDATION OF CHICAGO TO THE SUBCOMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES

Social Security Administration Proposal To Restructure Its Disability Determination Process

The Legal Assistance Foundation of Chicago, on behalf of indigent clients in Chicago, writes to comment on the proposal to reform the disability determination process issued by the Disability Process Reengineering Team ("Team") of the Social Security Administration. ("SSA").

The Legal Assistance Foundation of Chicago ("LAFC") provides legal representation to the poor in the City of Chicago on most civil legal matters. LAFC represents thousands of persons on Social Security and Supplemental Security Income ("SSI") issues each year. This representation, provided without cost to the clients, address both disability and non-disability issues. In that capacity, and in representation of such clients, LAFC attorneys Nancy Katz, Rebecca Saunders, and Thomas Yates submit this statement.

The Team has proposed broad-reaching changes to the social security disability process. Many of the specific proposals will be potentially beneficial to the disability program, including elimination of the reconsideration step, face-to-face interviews with the initial decisionmaker before issuance of initial decisions, limitations on Appeals Council review, and requesting that treating medical sources provide information concerning a claimant's functional ability.

However, we are troubled by the proposed wholesale change to the regulatory methodology for determining disability for both adults and children, ("the sequential evaluation"), the incorporation of the Americans With Disabilities Act requirements into the disability methodology, and the Team's failure to obtain public input concerning its proposal to change the disability sequential evaluations. Also, we suspect that the recommended changes in the disability methodologies will not lead to simpler, more efficient application.

A. Proposed Changes To The Adult Disability Methodology

Currently, in assessing adult disability, SSA uses a five step sequential evaluation process. The five step sequence, in use since 1978, sets forth a methodology to apply the Social Security Act's disability definition to individual cases. The Act requires SSA, in determining whether a claimant is disabled, to perform an individualized functional assessment of each claimant, that considers the claimant's medical impairments, age, education, and work experience.¹ While not perfect, the present sequential evaluation has stood the test of time. To the extent that it is

¹ The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which will last at least twelve months or to result in death. 42 U.S.C. § 423(d)(1)(A). The Act further provides that a claimant's impairment(s) must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy"--the latter phrase being defined as "work which exists in significant numbers" 42 U.S.C. § 423(d)(2)(A).

complicated, that is because of the Social Security Act's command that SSA perform an individualized functional assessment of each claimant.

The heart of the new four step sequential evaluation is establishment of a standard or "baseline" of work--all claimants found capable, despite their medical impairments, of performing this baseline of work would be found not disabled, regardless of their age, education, and work experience. The only exception to this baseline would be for claimants "nearing full retirement" age who have past relevant work experience, although that age is not defined in the proposal. The Team compares this baseline to the current category of unskilled sedentary work.

As formulated, the proposed adult four step sequential evaluation will probably make it more difficult for individuals to be found disabled.

Contrary to the Social Security Act's disability definition, the proposed sequential evaluation largely eliminates individualized functional review of the claimant's medical impairment, age, education, and work experience. The proposed sequential evaluation totally eliminates functional assessment at the first three steps, and severely curtails such assessment at the fourth step.

1. At the first step, under which disability may be denied if the claimant is working, SSA presently evaluates both the gainfulness and substantiality of a claimant's work activities. The substantiality determination includes evaluation of whether a claimant's work is comparable to that of unimpaired individuals in the community doing the same or similar occupations.

The proposed methodology appears to eliminate this review of the substantiality of the claimant's activities and instead imposes an amount of monthly earnings test. As proposed, the methodology would deny disability to any individuals with earnings of more than \$500 per month, regardless of the nature of their purported work activity.² This change will adversely affect many individuals with profound disabilities currently working in sheltered workshops or in subsidized work jobs.

2. At the second step, the proposed sequential evaluation replaces the current severity step (which allows SSA to deny disability to claimants whose impairment(s) do not significantly limit work activity) with a step that provides for denial of disability to claimants with no medically determinable impairments. Any functional assessment is eliminated.

3. At the third step, the Team proposes to eliminate the current Listings and replace them with an Index of Disabling Impairments. The Team states that this index "will contain fewer impairments and have less detail and complexity" than the current listings and that it will be "as nontechnical as possible" and "simple enough so that laypersons will be able to understand" it. The Team also states that there will be no consideration of a claimant's actual functioning at this step. Finally, the proposal eliminates the concept of equivalence under which a claimant could be found disabled if his or her medical impairments, including pain or other symptoms caused by such impairments, are medically or functionally equivalent to a listed impairment.³

² Under the SSI income budgeting methodology, many individuals with earnings of more than \$500 per month still qualify for some monthly SSI benefits and Medicaid eligibility.

³ This proposal also jettisons years of SSA work in improving and redefining the Listings to identify those medical conditions that are disabling regardless of age, education, and work experience.

4. The Team proposes to eliminate the present fourth and fifth steps of the sequential evaluation and replace them with an as yet undefined standardized measure of functional ability. This undefined standard "will be designed to measure, as objectively as possible, an individual's abilities to perform a baseline of occupational demands that includes the principal dimensions of work and task performance"

This baseline, which the Team compares to unskilled sedentary work, will not incorporate age, unless the claimant is nearing full retirement age. Likewise, the baseline will not incorporate education except that it notes that education will be reflected in assessment of a claimant's cognitive abilities. Indeed, the proposal provides that education is largely irrelevant--because the "baseline" will not require consideration of whether individuals have prior skills or significant formal job training: "formal education will have little impact on an individual's ability to perform the baseline of occupational demands."

Thus, the Team proposes to treat all claimants similarly regardless of age, education, and work experience. Thus, a 58 year old individual who is functionally illiterate will be held to the same standard as will a 25 year old individual with a college education, despite the Social Security Act's mandate that age, education, and work experience be taken into account. Indeed, one of the strengths of the present sequential evaluation is that it assumes that individuals who are older, less educated, and who have fewer job skills will be disabled by lesser medical impairments than will a younger individual with more education and job skills.⁴

We believe that this proposal, by eliminating individualized functional assessment, as noted above, will make the disability methodology less fair to those claimants with more adverse vocational factors (age, education, and work experience), and thus, will make it more difficult for the most disadvantaged to qualify for disability benefits.

B. Proposed Changes To The Child Disability Methodology

Only seven months after issuing final regulations for evaluating disability for children in the SSI program, the Team proposes a new four step methodology that largely eliminates the individualized functional assessment, the keystone to the present child disability methodology.

In so doing, the Team abandons the children's procedure that took several years to create by stating "the difficulty with [the current process] is that it may not appropriately define how much functional loss or interference with growth and maturity is comparable to inability to perform any substantial gainful activity."

We believe, after handling at least a thousand children's disability claims at the Legal Assistance Foundation of Chicago, that the present standard appropriately and accurately determines disability in children. We suspect that the Team seeks to change the standard solely because its application has led to a greater number of allowances than the standard invalidated in Sullivan v. Zebley.

⁴ Indeed, the proposal to create a universal baseline, applicable to all individuals, regardless of age, education, and work experience is the greatest flaw in the Team's proposal. The baseline of substantial gainful work that exists for older, less educated workers with few or no job skills is less than the baseline of work that exists for younger and better educated workers.

C. Proposed Gains In Simplicity, Efficiency, And Speed Of Application

The Team's proposed changes to the adult and child sequential evaluations, will, it hopes: a) be more understandable for laypersons, including claimants and SSA personnel; b) ensure that the correct decision is made the first time; and c) be amenable to quick and efficient application.

These goals will not be met through change in the disability methodologies. Individualized disability determinations do not lend themselves to a cookie cutter evaluative process--individuals with differing medical impairments, ages, educations, and work experience provide a myriad of different situations under which disability must be assessed. Thus, we believe that any disability methodology that complies with the Social Security Act must necessarily be more complicated than the Team proposes.

Indeed, the proposed sequential evaluation , if adopted, will probably end up being as complicated as the present sequential evaluation. First, eliminating the listings and substituting a less complicated index of disabling impairments ensures that most cases will be decided at the fourth step which will require some evaluation of the claimant's age, education, and work experience.⁵

Second, the proposal does not define the baseline of work which is the keystone of the proposed sequential evaluation. We believe that, to ensure that age, education, and work experience is considered appropriately, any baseline adopted will be at least as complicated as the present fourth and fifth steps in the sequential evaluation.

Finally, the proposal is designed in part to address the Team's concern that the present disability standard is applied inconsistently in the present four appeal levels at SSA. However, the solution to that problem does not lie with redefining the disability standard.

Rather, SSA must, as the Team proposes elsewhere in its proposal, do three things. First, SSA should develop a single set of policies that are binding on all decisionmakers and enforced at all levels. Currently, different rules apply depending on the level of appeal. Second, SSA must reform its quality review procedures to ensure that it gives equal scrutiny to both allowances and denials at the initial level. Currently, SSA reviews far more allowances than denials. Third, SSA must publish its single set of rules pursuant to the APA so all claimants and decisionmakers have access to this single set of policies.

Doing this, without changing the present disability standards, would go far to eliminate discrepancies in allowance rates among the different appeal levels.⁶

⁵ As designed, the Listings, by defining conditions that are disabling regardless of a claimant's age, education, and work experience, speed up the disability determination process because they allow disability determinations to be made on a wide range of medical impairments based solely on medical records. If the extensive Listings are replaced by a less complete Index, more cases will need to be decided at step four--application of which requires consideration of the claimant's age, education, and work experience as well as his or her medical impairments.

⁶ Another of the Team's proposals, which provides for initial level decisionmakers ("disability claim managers") to interview claimants, will also go far to eliminate discrepancies in allowance rates. Under the present system, the decisionmakers at the initial and reconsideration levels never see the claimants before making disability decisions.

D. Incorporating the Americans With Disability Act Into The Disability Methodology

The proposal requires that the disability determination process assume that all employers comply with the Americans with Disabilities Act ("ADA"), even if they do not. In determining the "baseline" of work that divides the disabled from the not disabled, the proposal provides that any reasonable accommodations that employers are required to make will be factored in.

Thus, the proposal would lead to SSA assuming that accommodations have been made such that disabled persons may work regardless of whether such accommodations have been made. This approach uses the ADA to harm the very group that it is intended to benefit. Moreover, it may violate the Social Security Act because it looks to jobs that should exist instead of jobs that do exist in the national economy.

E. Lack Of Public Input Concerning The Proposed Changes In The Disability Methodologies

We are troubled that the Team did not indicate, when it sought public input, that it intended a change to the disability determination standard. Indeed, we believed, based on the Team's assertion that it would not pursue a change in the statutory definition of disability as part of the reengineering effort, that it would not tamper with the present adult and child sequential evaluations. See Information about Process Reengineering at the Social Security Administration (undated sheet distributed by SSA) (The Team would not "make it more difficult for individuals to file for and receive benefits.").

Indeed, SSA stressed that the reengineering process would focus on the agency's procedures in claimhandling. Nancy Katz, one of the signatories of this statement, attended a meeting with Team personnel in Chicago on November 3, 1993. At the meeting, there was no discussion of possible change in the substantive disability standard or the sequential evaluation process.

In conclusion, we believe that the Subcommittee on Social Security should closely scrutinize SSA's proposal and further actions in implementing this proposal to ensure that they are indeed consistent with the dictates of the Social Security Act insofar as they provide for determination of disability status.

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Wilhelm H. Joseph
Director

April 20, 1994

Sub-Committee on Social Security
 Committee on Ways and Means
 U.S. House of Representatives
 1102 Longworth House Office Building
 Washington, D.C. 20515

Re: Comments on the Disability
 Process Redesign of the Re-
 engineering Team

Dear Committee Members:

I respectfully submit the following comments for your consideration in response to the Disability Process Redesign Report of the SSA Re-engineering Committee [hereinafter referred to as "the report"].

I have been in practice as a specialist in Social Security and SSI disability law for the past 20 years. I have personally represented thousands of disability claimants during that time. In addition, it is part of my job to assist other advocates in New York City and New York State in representing their disabled clients. I submit these comments on SSA's Re-engineering Report on my own behalf and on behalf of the thousands of disability claimants who have been represented over the years by Legal Services for New York City through its neighborhood offices.

Because the Report is long and complex, and the proposals it contains are interrelated and appear to be interdependent, a thorough analysis of all its provisions would be very lengthy indeed. I limit these comments, therefore, to what I consider to be the principal proposals.

1. STREAMLINING THE ADMINISTRATIVE PROCESS IS A LAUDABLE GOAL.

For years advocates have rightly complained that the disability process is lengthy and cumbersome and that the time it usually takes to process a claim bears little relationship to the quality of evidence development or decision-making that results. I applaud the Report for finally proposing to adopt a streamlined administrative process which does away with the reconsideration level of review and, to some extent, Appeals Council review.

However, the report does a great deal more than simplify the administrative process, which by itself might be workable. It links the simplified process with a multitude of substantive changes, in evidence and in the evaluation and definition of disability. Among the problems which concern me, are that neither the proposed changes -- substantive or procedural -- nor their implications have been carefully or completely thought through.¹ In addition, all the proposed changes rely on sophisticated computer support capacity as

¹ While the purpose of the report may be to provide a vision for the disability program for years to come, careful examination of the actual proposals is essential because SSA has indicated its intention to immediately begin implementation of the proposals contained in this report.

a necessary basis for the operational success of the whole package, computer capacity which SSA does not have.

2. THE RE-ENGINEERING COMMITTEE SAID IT WOULD NOT TOUCH THE DISABILITY STANDARD, BUT IT HAS DONE SO.

In the introduction to the report, the parameters of the committee's work are set out as follows:

"Every aspect of the process except the statutory definition of disability, individual benefit amounts, the use of administrative law judges as the presiding officer for administrative hearings and vocational rehabilitation for beneficiaries is within the scope of this reengineering effort." (Emphasis added) (Report p. 2)

However, the report proposes to substantially alter, not just the process of disability adjudication, but the basic standards by which disability is assessed. The report accomplishes this by suggesting the following: eliminate the medical criteria which SSA has always used to demonstrate *prima facie* disability (the Listings), and replace it with a different, less inclusive, but undefined, entity called "the Index of Impairments";² and eliminate the medical-vocational [GRID] regulations which have for 15 years determined the weight to be given age, education and past work experience in most cases. The alternate analysis which the Report proposes completely ignores education, and only considers age or past work experience for those in an as yet undefined category designated "nearing retirement age". (Report, p. 43-44)

The Re-engineering committee's proposal to change the disability evaluation standards not only exceeds the mandate under which it was intended to operate but does so, ironically, at a time when the evaluative standards are already being studied for SSA by a blue ribbon panel of medical, vocational and other experts whose charge is to consider whether the current definition of disability requires change and, if so, to suggest such changes. That panel's report is due within the next two years.³

In the meantime, the proposals in this Report constitute an unjustified departure from the well-crafted standards and evaluation techniques contained in the medical-vocational regulations which have been in existence, and have been tested repeatedly, since 1979; and which have been reconfirmed by the agency when, in 1992, SSA reported in the federal register that such regulations were working well and required no change.⁴

3. THE RE-ENGINEERING TEAM HAS A VISION OF WHAT THE DISABILITY STANDARD SHOULD BE AND THE VISION IS WRONG.

The definition of disability as set forth in the statute contains the following elements: 1) the inability to perform substantial gainful activity; 2) by reason of a medically determinable physical or mental impairment, 3) which has lasted or is expected to last 12 consecutive months or end in death; 4)

² To the extent that the Index will list fewer impairments, it would further limit the number of claims which could be automatically granted, thus unnecessarily prolonging the disability process for many individuals and likely resulting in more denials, despite the Committee's claim that no difference in the overall percentage of allowed claims is intended.

³ Disability Policy Panel, National Academy of Social Insurance, final report approximately September, 1995.

⁴ 57 Fed Reg 43005 (September 20, 1992).

taking into account the individual's age, education and past work experience [42 USC §423(d)].

The Committee's proposal to entirely ignore education, to ignore past work experience and age (except for individuals in the undefined category "nearing retirement age"), constitutes a direct assault on fundamental aspects of the statutory definition of disability, without any demonstration of the necessity of the proposed changes or documentation of the benefits such changes would bring.

At the same time the Committee is also proposing to jettison the Listing of Impairments, a set of longstanding regulations which allows an automatic finding of disability when a claimant meets or equals certain specified medical criteria. The Committee intends to replace the Listings with a simpler, less inclusive, less detailed entity called an "Index of Impairments". (Report, p. 38) It is not clear how this Index would be an improvement over the Listings, since the Listings themselves are subject to periodic revision allowing them to remain consistent with improvements in medical technology and developments in medical science.

Having discarded all the well-tested tools (Medical-vocational regulations, Listing of impairments, and general definitions related to age, education and work activity) which have been employed to evaluate disability, and with which agency employees are familiar, the Re-engineering Committee goes further in proposing to substantially alter the sequential evaluation process employed by SSA for years. Thus, the current five step process would turn into a four step process. (Report, p. 36-40).

In the current five step process the last issues which SSA evaluates to determine disability are whether a claimant can return to his or her past relevant work (work performed in the preceding 15 years), and if not, whether he or she can perform any other work in the national economy, taking into account his or her age, education and past work experience.⁵ Under the Re-engineering Committee's proposed system, which has discarded virtually all consideration of age and past work experience (except as regards an undefined "nearing retirement" category) and absolutely all consideration of education, the sequential evaluation ends in a fourth step which purports to evaluate the ability to perform substantial gainful activity newly defined as "basic physical and mental demands of a baseline of work" (Report, 40-42).

What this baseline would include or how any claim would be evaluated applying it, can only be guessed at because the Committee offers no substance. One cannot help but speculate, however, that the proposed four-step process reflects the end of any attempt by SSA to actually perform an individualized functional assessment, which is the heart of the current sequential evaluation process and of the statutory definition of disability. In place of an individualized assessment it seems highly likely that claimants would be subject to an "average person" test, irrespective of the individualized indicia now required by the statute (e.g. age, education, work experience; and, impairment-related symptoms such as pain, weakness, fatigue, etc. to which individuals react very differently).

This Report is in all ways and at all points simply too vague to be understood. Further, is it really necessary or advisable to alter both the processing system and the adjudicative standards of the disability program when the primary stated concern is the length of time it takes to process claims. The Committee has not demonstrated that after simplifying the process, any other fundamental changes are necessary.

⁵ 20 CFR 404.1520; 416.920.

4. THE RE-ENGINEERING COMMITTEE IS MISGUIDED IN PROPOSING THAT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT BE APPLIED TO DETERMINATIONS OF DISABILITY UNDER THE SOCIAL SECURITY ACT.

The Report repeatedly cites the Americans with Disabilities Act in discussing the level of dysfunction which the proposed "Index of Impairments" will reflect, and in evaluating claims under the fourth step of the proposed sequential evaluation in considering whether an individual can perform the "baseline of occupational demands." (Report, pp 39, 42, respectively). There is no basis in law or in logic to interrelate the two statutes as the Report is proposing to do.

The Americans with Disabilities Act ("ADA") is an antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities by requiring employers to consider whether reasonable accommodation could remove such barriers to work.⁶ On the other hand, the disability insurance program under the Social Security Act ("SSA") is an income replacement program for individuals whose medical condition prevent them from performing work in the competitive job market. As Daniel Skoler, the Associate Commissioner of Social Security pointed out in a policy memo on the relationship between the ADA and SSA, "...the ADA and the disability provisions of the Social Security Act have different purposes, and have no direct application to one another."⁷

The brevity of references to the ADA in this report, make it impossible to assess the consequences of its application to a disability analysis. But one must ask whether the Committee is suggesting that evaluation of possible workplace accommodations would be required in determining disability and whether the theoretical possibility that a claimant's functional limitations might be accommodated by a hypothetical employer could constitute a new, independent basis for denial of a disability claim. If this is the case, it is an exceedingly inappropriate idea.

5. THE RE-ENGINEERING REPORT RELIES ON ASSERTIONS WHICH ARE AS LIKELY TO BE UNFOUNDED IN THE FUTURE AS THEY HAVE BEEN IN THE PAST.

The report repeatedly states that decisions will be more correct, that notices will be more understandable, that claimants will be more satisfied with the process.⁸ These assertions are premised on the promise of a speedier process made possible by a more sophisticated computer system.⁹ But despite the fact that SSA has been using computers for years to issue notices and decisions, it has continually had difficulty communicating in language understandable to ordinary people, or even to advocates who have a sophisticated knowledge of the administrative process and Social Security rules and regulations. Thus, the fact that SSA has computer capacity has not, to date, resulted in quality in its

⁶ ADA Handbook, EEOC-BK-19, p. I-1.

⁷ Memorandum from Dan Skoler to Headquarters Executive Staff, etc., June 2, 1993.

⁸ Re-engineering Report, p 23 et. seq.

⁹ Indeed, every aspect of the processing and decision-making changes proposed in the re-engineering report is premised on the existence of an advanced computer system including new hardware and software, as well as a thoroughly computer literate workforce capable of utilizing the system effectively and efficiently, none of which presently exists or is likely to become available for many years.

decision-making or in its ability to convey information to claimants and others. Indeed, even in the last few weeks hearings were held on the lack of quality of SSA notices and other communications.¹⁰ Given that track record, are there any grounds to believe that things will dramatically improve as the re-engineering report asserts they will? Thus, it is important to consider what SSA can actually accomplish now, in the absence of the technology which all the proposed changes require and on which their success relies.

6. THE NEW ROLE OF THE APPEALS COUNCIL AS REVIEWER OF ALL FEDERAL COURT FILINGS MAY CREATE ADDITIONAL HURDLES TO FEDERAL COURT ACCESS.

The Report proposes that ALJ decisions become final administrative decisions and that the Appeals Council be limited to 1) reviewing cases only on its own motion, and 2) reviewing all complaints filed in federal district courts to determine whether a claim is defensible.¹¹ Making ALJ decisions final administrative decisions is not a bad idea, but were that to happen, what would be the impact of the Appeals Council's new role? One can only hypothesize for lack of discussion of, or concrete information about, this proposal. For example, the report does not explain what the bases for own motion review would be, whether such review would have to be performed within 60 days as is now required by regulation, what input a claimant would be allowed if review occurred, or what happens to the right to judicial review pending completion of Appeals Council own motion review.

Nor do we know what procedure the Appeals Council would follow in reviewing claims filed in federal court: would they, for example, be required to decide on defensibility during the 60 days before an answer must be filed? Would they be allowed to extend the time to file an answer based on a pending inquiry into defensibility, and if so, for how long might they hold off answering? Could the Appeals Council take jurisdiction of a claim for review without concluding that remand was necessary, and could they do so unilaterally without the claimant's agreement? None of these questions is answerable from the report; all are essential to understanding when and how judicial review would actually operate.

CONCLUSION

The Report contains proposals which involve complex and dramatic changes not only to the disability process but to the standards by which disability is determined. However, the report fails to demonstrate why substantive changes in the disability standards are necessary, nor does it contain any empirical evidence to support its proposals. Additionally, the report contains changes which may or may not accomplish the goals which the team promises, or be realistic or feasible given current budgetary constraints. Note for example that the report does not contain any cost benefit analysis generally; nor any specific cost estimates related to a) the computer system on which the success of all proposals depend, or b) personnel redeployment, re-education and training, or geographical relocation, etc.

¹⁰ House Subcommittee on Social Security, Committee of Ways and Means, hearing on complaints regarding inaccurate, misleading and insensitive Social Security notices, March 22, 1994.

¹¹ Re-engineering Report, p. 55.

It is, therefore, extremely urgent that this Committee carefully evaluate the merit and feasibility of each of these proposals as well as their impact on the disability program as a whole. The proposals must be fully debated before SSA is allowed to go forward in effectuating them. SSA should be required to subject any of the proposed changes which do not require statutory amendment to notice and comment under the APA before effectuation is attempted.

I appreciate your thoughtful consideration of these matters.

Respectfully submitted,



Barbara Samuels
Attorney at law

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David S. Udell
 Senior Attorney

May 13, 1994

Subcommittee on Social Security
 Subcommittee on Ways and Means
 1102 Longworth House Office Building
 Washington, D.C. 20515

Re: Social Security Administration
 Reengineering Team Report:
 "Disability Process Redesign"

Dear Subcommittee Members,

I respectfully submit the following comments for the Committee's consideration in connection with the April 14, 1994 hearing on the Social Security Administration's Reengineering Team Report, entitled "Disability Process Redesign" ("Report"). The comments contained in this letter are based on my experience as an advocate for Social Security claimants during the past ten years, and as one of class counsel in several class action lawsuits that have challenged specific SSA practices and procedures as violative of the agency's duties under the Social Security Act.^{1/} I have also participated in the work of the Administrative Conference of the United States (ACUS) concerning the Social Security Administration's administrative appeals process.

I ask the Committee to urge the Social Security Administration to withdraw the part of the Report entitled "Disability Decision Methodology" (Report, at 36-49), prior to releasing a final version of the Report. The "Methodology" was developed without adequate involvement of the public, and would lead to very unfair results in the adjudication of claims for disability benefits. Moreover, the "Methodology" violates both the Social Security Act and the Americans with Disabilities Act.

The "Methodology" was developed by the Team without meaningful input from the public. At the two meetings I attended with the Team (one in Washington and one in New York), members of the Team stated that no changes would be made in the statutory disability standard, and encouraged persons in attendance to conclude that no changes were contemplated for the agency's regulatory "sequential evaluation." No discussion occurred at either meeting concerning any of the concepts contained in the "Methodology." Indeed, based on recent conversations with many different attorneys who participated in meetings with the Team in other parts of the Country, I am confident the Team did not seek or obtain comments concerning the "Methodology" during any of the Team's "external meetings." See Report, at 101-103 (list of "external meetings"). The Team has also downplayed the significance of the "Methodology" in connection with the release of the Report, failing even to include the "Methodology" among the list of "Key Features" that was widely distributed by the Team on March 31, 1994.

The "Methodology" is not justified by any significant problems with the existing sequential evaluation. In contrast to

^{1/}See e.g., Stieberger v. Sullivan, 801 F. Supp. 1079 (S.D.N.Y. 1992); Kendrick v. Sullivan, 784 F. Supp. 94 (1992); State of New York v. Sullivan, 906 F.2d 910 (2d Cir. 1990).

the Team's analysis of other areas designated for proposed reforms, the Report does not assert that the sequential evaluation is overcomplicated, hard to administer, prone to error, or deficient in any respect. Apparently the Team has recently become aware of this deficiency in the Report, since it has recently issued a "Question and Answer" document (dated May 5, 1994, and enclosed herein) that offers an extended discussion of potential justifications for the "Methodology." The proposed justifications include: (a) court decisions have made the current methodology complex; (b) changes in medical technology have made the current methodology complex; (c) claimants and employees find the current methodology hard to understand; (d) the new "Methodology" will be easier, faster, and more cost effective; (e) the new "Methodology" will eliminate the need for "lengthy interviews" and "more extensive development of evidence;" (f) the new "Methodology" is needed for the "claim manager concept.

Neither the Report, nor the "Question and Answer" document, contain any data to substantiate these newly claimed justifications for the "Methodology." The Team has not offered any explanation of why court decisions make the agency's tasks too complex, why medical technology makes the agency's tasks too complex, why the new "Methodology" is easier to understand than the current methodology, why the new "Methodology" is easier, faster, or more cost effective than the current methodology, why the new "Methodology" would cut down "lengthy interviews" or reduce the need for "development of evidence." At the very least, the Team should be required to explain the content and basis of these conclusions.

Most incredible, is the Team's candid admission that the "Methodology" is designed in part to counteract court decisions that make the agency's tasks "complex." The commendable goal of "reengineering," and the national consensus in favor of "simplifying the process" must not serve as a license to enable the agency to gut court decisions that it lost and does not like. The courts have scrupulously held the agency accountable to the Social Security Act's command to make individualized decisions on benefit claims, taking into account all relevant evidence of claimants' impairments, including evidence of pain and evidence concerning a claimant's unique vocational profile. The reengineering process should not constitute an "end run" around this core principle.

The Report states that the new "Methodology" will only change the "method" of deciding disability claims, and will neither alter the definition of disability nor the agency's overall allowance and denial rates. The "Question and Answer" document continues with this theme, but carefully skirts the specific question of whether particular individuals who would receive benefits under the present methodology, would lose benefits under the new "Methodology." See, e.g., Question and Answer, Number 5 ("Does the new methodology deny claimants that are allowed under the current process?"). The Team explains that the question cannot be precisely answered until the Team first defines the concepts of "nearing full retirement" and "baseline work activity." This approach of "let us push ahead with the new 'Methodology' and we will let you know its impact later" should not be tolerated where the stakes are so high for individuals who must rely upon the Social Security Administration when they become disabled.

Although the Team hedges when directly questioned, the Report, itself, contains clues that indicate the new "Methodology" will in all likelihood have a very harsh impact on claimants. Thus, with respect to "step three" of the new "Methodology" the Report proposes to substitute a new narrow "index" for the current "listing" of disabling impairments, and also proposes to eliminate the concept of "equivalence." The

Report does not squarely admit it, but these changes would reduce the number of claims allowed at step 3 and would ultimately reduce the overall number of claims allowed. Claims that are not allowed at step 3 take longer to adjudicate, involve supplemental medical consultative examinations that are burdensome to the claimant and expensive for the agency, and subject the claimant to the inequities of the final steps of the proposed new sequential evaluation (discussed below).

Similarly, the proposed final steps of the new sequential evaluation would be excessively restrictive if, for example, the agency ultimately defines "nearing full retirement" as occurring at or beyond age 55, and defines "baseline occupational demands" as the demands associated with "unskilled sedentary work." Under such a "Methodology," SSA would deny claims of persons who are less than age 55 who have the functional capacity to perform "sedentary work." SSA would also deny claims of persons age 55 or older, who have not previously worked, if they have the functional capacity to perform "sedentary work." These denials will occur under the "Methodology" without consideration of whether the applicant, with his or her particular vocational profile, can reasonably be expected to work in the national economy.

In contrast, under the present sequential evaluation, the Medical-Vocational Guidelines direct a finding of "disabled" for persons over age 50, who can perform the tasks associated with "sedentary" work, but who have a limited education and no job skills. See 20 C.F.R., Part 404, Subpt. P, App. 2, §§201.09, 201.10, 201.12, and 201.14. The Medical-Vocational Guidelines also direct a finding of "disabled" for persons over age 55, who can perform the tasks associated with "sedentary" and "light" work, but who have a limited education and no job skills. See 20 C.F.R., Part 404, Subpt. P, App. 2, §§202.00(c), 202.01, 202.02, 202.04, 202.06. The "Methodology" simply ignores the vocational data that underlie these Medical-Vocational Guideline results, and ignores reality for the many applicants whose medical impairments, in combination with their specific vocational profiles, precludes actual employment. The "Methodology" thus deprives claimants of the individual assessment of disability that is required by the Social Security Act.^{2/}

In encouraging members of the public to conclude that the disability standard was not "on the table," the Team also failed to seek public input about the idea to use the Americans with Disabilities Act as a basis for rejecting certain individual's disability claims. The failure to seek public input may have led the Team to overlook the findings of Associate Commissioner of Hearings and Appeals, Daniel Skoler, who recently evaluated the relationship between the Social Security Act and the ADA and concluded that SSA could not properly condition benefits on the theoretical possibility that lawsuits could compel employers to accommodate disabled persons. The Team apparently also overlooked certain inevitable indirect effects of the ADA--the number of jobs in the national economy for persons with "disabilities" will grow, gradually, due to the ADA, and this growth will ultimately be reflected in the vocational data underlying the current Medical-Vocational Guidelines. In this way, the ADA will gradually make it possible for more people to work, and will raise the standard for obtaining disability benefits. The Team has not justified the proposal to use the ADA a criterion to deny benefit claims of people who cannot work, and who cannot reasonably expect potential employers to responsibly

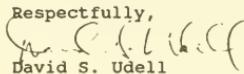
^{2/}See, also, *Heckler v. Campbell*, 461 U.S. 458 (1983) (upholding Medical-Vocational Guidelines because they adequately consider vocational data). The agency recently declared that the vocational data underlying the current approach remain valid. 57 F.R. 43005 (September 20, 1992).

implement the ADA. . .

Because of the lack of public input during the development of the "Methodology," it is very likely that many individuals will use the agency's official "comment period" to identify many serious problems with the "Methodology" (some of these problems are described in this letter). I hope such comments will be heeded, and that the "Methodology" will not receive the deference that is normally afforded to agency initiatives in effectuating the Social Security Act. In contrast to many of the other concepts contained in the Team's Report, the "Methodology" was not the product of a carefully considered process. If ever adopted, the "Methodology" would almost certainly become a subject of litigation.

Apart from all the serious problems with the "Methodology," the Report contains several good ideas that are worthy of further development through issuance of Notices of Proposed Rulemaking and eventual adoption of appropriate regulations. For example, consistent with past proposals of the Administrative Conference of the United States (ACUS), the Report thoughtfully proposes to narrow the functions of the Appeals Council, and to provide claimants with a chance to personally appear before an agency decisionmaker prior to the initial denial of benefits. Similarly, the Team's proposals to centralize decisionmaking responsibility with a single casehandler and to unify agency policy in a single set of instructions, seem at first glance to be very worthwhile. The issuance of NPRMs addressing these concepts will be awaited with much interest.

Thank you very much for your efforts in connection with this important matter.

Respectfully,

David S. Udell



DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:

Baltimore MD 21235

MAY 0 3 1994

Dear Colleague:

We recently sent you the Proposal and Background Report from the SSA Disability Process Reengineering Team, a proposal to redesign the disability claims process. We also advised that a national dialogue period on the redesign proposal would begin as of that date, and continue through May 27, 1994.

As the dialogue period has progressed, several issues have been raised frequently. The SSA Disability Process Reengineering Team compiled the enclosed questions and answers to assist in clarifying these issues; they are organized into two sections: disability methodology issues and disability process issues. We are sharing them to assist commenters as they compose their insights and suggestions on the proposal.

Also enclosed is the announcement of a public meeting to be held on May 16, 1994 on the proposal. Notice of this meeting was published in the Federal Register on May 3, 1994.

We appreciate your consideration of these issues and look forward to receiving your comments.

Sincerely,

Rhoda M. G. Davis
Director, Process Reengineering
Program

Enclosures

DISABILITY METHODOLOGY ISSUES

1. Why do you need to change the disability methodology? Why did you not just change the process?

We found that the current methodology, which was originally designed to identify and evaluate cases in a simple and rapid fashion has grown increasingly complex as a result of court decisions and changes in medical technology. We also found that "process" problems are frequently driven by the underlying policies and methodology for deciding disability. From the viewpoint of the claimants and the medical community, we learned that the current methodology is difficult for them to understand. From our own employees, we learned that the decisional methodology is difficult to understand and to try to explain to the public.

2. Are these the only reasons for proposing a revised methodology?

No. From a practical standpoint, the entire proposal is designed to make correct decisions easier, faster, and more cost-effectively. The decision methodology is pivotal to both evidence collection and the intake/interview process. Without a revised decision methodology, we would have to continue to have lengthy interviews and do more extensive development of evidence. Finally, a simplified methodology (that still results in quality decisions) is central to the success of the disability claim manager concept.

3. If the decision methodology needed "streamlining" for the proposal, why didn't the proposal recommend improving the existing process rather than trying to replace it?

Consistent with the tenets of reengineering, the team decided that incremental changes would not have been sufficient to redesigning the disability process. It was decided that a new approach would be needed to achieve radical and dramatic improvements to the disability process. The team believed that a new approach to deciding disability was necessary to achieve dramatic improvements to the process, particularly to realize the benefits of using a disability claims manager. The goal is to guide adjudicators to making the correct decisions in an easier, faster, and more cost-effective manner.

4. How will the proposed methodology affect program costs?

The intent of the proposal is to have a neutral effect on program outlays. In the aggregate, the same percentage of cases paid under the current process will be paid under the proposed process.

5. Does the new methodology deny claimants that are allowed under the current process?

The intent of the proposal is to remain neutral with respect to program outlays. It is not the proposal's intent to affect the benefits of current beneficiaries. It is also not our intent to reduce the percentage of cases that are allowed under the current process or to make it more difficult for an individual to be found disabled. The goal is to arrive at the correct outcome in a simpler way. However, there is still more work that needs to be done with respect to the definition of an appropriate age for "nearing full retirement" and the specific occupational demands of "baseline work activity" before we can determine the affect of the proposal on a given individual.

6. What will the new Index of Disabling Impairments look like and how will it be different from the current listings?

The new index will be easy to understand so that our claimants, advocacy groups and third parties who assist claimants, and our employees can easily understand the requirements and will be able to explain what it takes to meet the Index. In comparison to the current listings, the index will:

- o contain fewer impairments,
- o have less detail and complexity,
- o permit adjudicators to quickly identify severely disabling impairments based on simplified criteria, and
- o no longer include criteria that attempt to measure a claimant's functional ability.

7. Does that mean that claimants who are allowed today at the listings step, will be denied under the new proposal?

No. Under the proposed process, the Index will only be used to allow an individual; it will not provide a basis for denying a claim. Claims by individuals who do not meet the criteria of the Index will simply be decided at the fourth step of the evaluation process which is based on an assessment of function.

For example, in conducting an initial claims interview, the disability claim manager will be able to quickly determine whether an individual is working and whether the claimant has a medically determinable impairment that does not meet the criteria of the Index. Thus, from the beginning, the disability claim manager will be able to focus the interview on obtaining information and evidence necessary to decide the claim at the fourth step of the process and explaining to the claimant how we will make that decision at the fourth step.

Also, we expect that individuals who are correctly allowed under the current listings would be so severely impaired that we would allow them at the fourth step in the new process when we assess their ability to function.

8. Many listings have been updated very recently and represent the consensus of the experts in the disability community. Given the time and expertise that has been brought to bear to develop the current listing, why do you need to start over?

We intend that all that we have learned through the development of the listings, including the childhood listings, will be brought to bear in deciding what the Index should look like and what elements are necessary to arriving at appropriate standardized measures of function and the specific occupational demands of baseline work activity. However, we expect to continue to consult with the medical community and other outside experts as we further develop the specific elements and criteria of the proposed methodology.

9. Why are you eliminating the listings if you are not really trying to deny more people?

The proposed methodology in its totality has several objectives. One of these is to have an understandable, readily shared base of disabling impairments. A second is to provide both treating sources and decisionmakers with a consistent frame of reference for deciding disability, i.e., assessing function, no matter what diagnosis has been established. A third, which derives from the first two, is to lessen the need for voluminous medical records by focusing on the consequences of medical findings, i.e., function.

The index is but one element of the methodology which is designed to quickly identify disabling impairments. The general approach is to focus decisionmaking on assessing function for the majority of claimants.

10. But don't you assess function ability in the current process?

Under the current process, the adjudicators must assess function at each step of the process, and the "functional evaluation" is somewhat different at each step. For example, at the second step, the adjudicator must decide whether the impairment or impairments result in functional loss of work-related activities, but the functional loss need to be only "de minimus". At the next step, the Listings vary with some having functional components.

Finally, the consideration of ability to work at the last two steps requires a complete residual functional capacity assessment. To do this SSA relies on objective evidence, treating source opinions considered to be consistent with the objective medical findings, and the claimant's description of his or her limitations. In the proposed process, we will assess function, assess it once in the process, do it directly rather than indirectly, and rely on a standardized functional assessment instrument to do so.

11. So in the new process, who will be responsible for assessing residual functional capacity?

There is no "residual functional capacity" in the new process. Rather, we will assess the individual's ability to do work activity using standardized measures of function.

12. Can you give me an example of a listing that will be included in the Index?

We would expect that many of the neoplastic diseases in the current listings would be included in the Index.

13. Does that mean that the only thing in the Index will be terminal illnesses?

No. We will also include impairments that are so debilitating that any individual would be unable to work for at least 12 months, such as acute leukemia and kidney transplants.

14. Can you give me an example of a listing that will not be in the Index?

We would expect that the listing that evaluates breathing impairments with a highly specialized breathing test would not appear in the Index. That listing has more than two pages in the Federal Register describing the test and the procedures that must be followed in administering the test. This is an example of a complex, highly detailed listing that is difficult for the public to understand, requires specialized medical evidence that may not be readily available from treating sources, and impedes timely and efficient decisionmaking.

In the proposed process, rather than focusing on highly specialized tests of this nature, we will, with the assistance of the medical community and other outside experts, develop instruments or protocols that can measure the functional consequences of such impairments in a standardized way.

15. Why did you eliminate "medical equivalency?"

As noted previously, we are not trying to fix the current process. Under the proposed process, there is no need to determine "equivalency" because the primary focus of disability evaluation is to assess an individual's functional ability to do work activities.

16. What is the role of the medical consultant in the new process?

In the proposed process, adjudicators at all steps in the process will rely on medical consultants to provide expert advice and opinion regarding medical questions or complex issues. Additionally, on a national basis, SSA may identify specific types of issues that may require a medical opinion. Medical consultants will not, however, be required to sign off on disability decisions as one of the decisionmakers.

17. Is your proposed disability methodology consistent with the statutory definition of disability?

Yes. The statute defines disability in terms of the individual's physical or mental condition taking into consideration age, education, and work experience. The proposed methodology includes an individualized assessment of function in a holistic (whole person sense) manner and requires evaluation of previous work, when appropriate, and age.

18. But doesn't the definition of disability include education?

Yes, it does. The current medical vocational guidelines (the "grid") evaluate educational level by relying on a literal use of the grade level that an individual has completed, e.g., 9th grade level. Critics of this approach have pointed out many problems, including: education is often obtained many years in the remote past and adds very little value to the individual's ability to perform work activities; and the grade level does not necessarily relate to the claimant's intellectual, cognitive or other mental abilities to perform work-related activities.

19. How does the proposed methodology consider education?

The proposed methodology includes evaluation of every individual's ability to function, including physical and mental functioning, where appropriate. This assessment of function would include any deficits of intellectual functioning or cognitive ability which would be more appropriate than relying on a numeric grade level.

20. Does this mean that literacy and/or the ability to communicate in English is no longer a factor in disability evaluation?

In identifying the occupational demands of baseline work that represents work existing in the national economy, SSA will need to consider whether literacy and/or the ability to communicate in English is required as an occupational demand. Until the necessary research is conducted, we can not say exactly how these factors will impact on decisionmaking.

21. Your proposal refers to the Americans with Disabilities Act (ADA) in several places. Does this suggest that you intend to rely on the ADA as a basis to deny more people?

No. The reference to the ADA is to recognize that the ADA and the Social Security Act must operate in tandem and that the agencies of the Federal government must speak with the same voice on the same subject. As SSA defines the baseline of occupational demands that are required to perform work that exists in significant numbers in the national economy, SSA should recognize that the ADA may affect how occupational demands are defined for the broad world of work. It is not, however, the intent of the proposal to use the ADA as a basis to deny more people.

DISABILITY PROCESS ISSUES

1. The proposal seems to work best when all components or individuals involved work at a single location. Do you see all employees working together at one site?

The proposal envisions an automated national claim processing system to support the entire reengineered disability process. This system will rely on an electronic claim record. With this system in place, the physical location of individuals working on a claim becomes less of a factor in the success of the proposal.

2. How is the Federal/State relationship regarding the processing of disability claims going to change as part of this initiative?

Decisions regarding organizational issues were not part of the "50,000 foot view" developed for this proposal. During the comment period for the proposal, the DDSSs, as well as other SSA components, will offer their ideas for how they can best contribute to the new process.

3. Claims representatives are now inundated with work. Most field offices have their claims representatives specialized. Do you really think one person can handle all three aspects of the job (medical, non-medical for both titles II and XVI)?

Many claims representatives told the team that although they are inundated with work, they believe it is possible for one person to deal with the amount of technical information required to make medical and nonmedical determinations. Additionally, they stated they believed they could provide claimants with better service if they understood the entire disability determination process and their jobs would be more rewarding if they were actually able to handle all aspects of the claim.

The overriding principle underlying the disability claims manager concept is that one individual can handle all aspects of the disability program for title II and title XVI if the methodology for reaching a disability decision is vastly simplified; if systems advances, including a decision support system, are implemented; if adequate training is provided; and if medical and technical support personnel are available to assist the disability claims manager on complex cases.

The disability claims manager position should be viewed as an entirely new position, and not a combination of the claims representative and disability examiner jobs.

4. What size caseload do you see the disability claim manager handling?

Our modeling assumptions call for the disability claim manager to handle a pending workload of about 50 cases. However, this is just an approximation. Actual average caseloads will be determined by final design requirements and organizational decisions.

5. The face-to-face predenial interview could pose a threat to employee safety. Why did the team make this recommendation? What steps can be taken to ensure employee safety?

One of SSA's primary responsibilities to its employees is to provide a safe environment with appropriate security measures available to its employees in the event of threats to their safety. Employee safety will be a major focus of implementation efforts for disability reengineering.

The team believes the claimant should be afforded an opportunity for a personal interview when evidence does not support an allowance. The interview can be conducted in-person, by videoconference, or telephone. The purpose of the interview is for the disability claim manager to advise the claimant of what evidence has been considered, and work with the claimant to identify further evidence that may be available. The purpose of the interview is not to explain the disability denial to the claimant.

The personal interview, and its mode of conduct, is optional for the claimant. However, if the disability claim manager has safety concerns, he or she may determine the interview may best be conducted by videoconference or telephone, or if conducted in-person, should be done by or with another employee, or with a manager present.

6. Face-to-face predenial interviews will not reduce the number of claimants who appeal their claims. In fact, they will allow for the admission of subjectivity into the decisionmaking process. How does the team justify proposing this new step if it won't fix the process?

The team found that the public perception of the current process is that a claimant cannot speak with a decisionmaker until a claim reaches the hearing level. This is frustrating for claimants and lends to their confusion about the program.

Based on public feedback from claimant focus groups, interviews with third parties and advocates, experience gained by administrative law judges and disability hearings officers, and service provided by other public and private organizations, the team felt it important that face-to-face predenial interviews be a part of the proposal. Since a

primary mission of the team was to develop a process that provided world-class service to its customers and since the customers asked for this service, it was seen as an important aspect of the redesigned process.

With regard to the subjectivity of the decisionmaker, interviews with the many decisionmakers across the country who now meet with the public in various phases of the disability process (e.g., claims representatives make eligibility decisions, disability hearings officers make CDR decisions, and administrative law judges make hearing decisions) resulted in the opinion that this should not be a major influence in the final claim decision. Claim decisions will continue to be based upon documentation and objective criteria while opinion will be weighed with supporting information.

7. Does the new proposal address the problems experienced with claimants who file and pursue appeals repeatedly at the direction of other agencies or companies?

The new proposal addresses this issue by making material about the DI and SSI disability programs widely available to the general public, including basic information about the definition of disability. With more complete and clear information available, individuals, as well as agencies and companies should be in a better position to determine whether an individual should pursue disability benefits, reducing the number of applications from individuals who clearly do not meet SSA's definition of disability.

Individuals who do decide to file should come to SSA better prepared as a result of the public information available to educate them about what evidence is required to support their claim, reducing the need for SSA to undertake extensive evidentiary development. Finally, if individuals are denied, the explanation of their denial will follow a "statement of the claim" approach, which will provide them clear information about the reason for the denial, thereby reducing the number of individuals who repeatedly file and pursue appeals because they do not understand the reason for their initial denial.

The proposal also envisions that SSA will be more active in working with third parties to educate them about SSA's disability programs and their requirements, and to allow them to assist claimants in applying for benefits. Part of this partnership will include an ongoing dialogue about the third party's compliance with SSA's application process requirements.

8. You say you eliminated the reconsideration process, but it looks like you just moved it to the new adjudication officer position. Is this really simplification?

Elimination of the reconsideration and establishment of the adjudication officer position simplify the process because claimants will need to contact SSA only once after receiving their initial disability determination in order to pursue all administrative appeals on their claim. Presently, claimants must contact SSA to file a reconsideration, again to request a hearing, and a third time to request an appeals council review of their claim.

An additional simplification results from the adjudication officer's authority to issue a favorable decision if the evidence warrants, eliminating the need for the claimant to continue through a formal hearing in order to receive a favorable decision.

9. Your proposal did not reengineer the way a case goes through the processing centers. Why not?

The proposal calls for the disability claim manager to effectuate payment for title II or title XVI cases at any point at which a case is approved. The development of a fully integrated, national claim processing system will support this capability no matter where the disability claim manager is located organizationally or geographically.

10. From the perspective of DDSs with low processing time, what's so good about this reengineered process? Give the DDSs the systems support, the simplified decision methodology, the increased fee for medical evidence of record and they'll give you 25 days or less processing time.

Although many DDSs are processing cases on a timely basis under difficult circumstances, SSA is running a national program, and has an obligation to ensure that claimants nationwide consistently are provided prompt, courteous, and responsive service. Additionally, claimants have told us that the time it takes to process their case is not their only concern; they want more personalized service and they want to participate in a process they can understand.

11. What kind of performance evaluations are you suggesting with the concept of employee certification? Isn't this just another non-value added step in the new process?

The concept of certification establishes a formal process by which employees are ensured of participating in an appropriate level of program training each year, and reinforces the quality standards envisioned under the proposal. Adjudicators will have broader authority under the new proposal, and with that will come the need to assure the public and higher monitoring authorities that adjudicators are well trained, highly skilled and competent in their positions; the yearly certification of competence will do this.

12. Your design model assumptions are very optimistic. What rationale or data are you using to support such high expectations?

Assumptions for the model were developed based on the expectation that the proposal would be adopted in total and fully implemented including complete systems decisional support, increased public information, and simplified decisional methodology. The assumptions include scenarios encompassing low and high extremes for case processing, as well as middle-of-the-road expectations.

13. Do you really think treating sources will fill out a certification form?

Yes; however we will have to strengthen our relationship with the medical community first. The medical community today is inundated with paperwork from employers, insurance carriers, state agencies and federal agencies. SSA will be developing a standard form to assess function, which would optimally be adopted by these other organizations as well. The long term impact of this standardization will be to ease the burden on medical providers by reducing their variety of paperwork. Finally, increased professional relations efforts, including adding segments regarding disability determinations in medical school curriculums, will serve to heighten the medical community's awareness of these issues.

14. What kind of increase do you see in paying for medical evidence of record?

SSA will establish a national fee reimbursement schedule for medical evidence, including a sliding scale mechanism to reward the early submission of medical information.

15. Will the adjudication officer consult with the administrative law judge while developing the record? Will the administrative law judge sign off on adjudication officer decisions?

The adjudication officer will consult with the administrative law judge during the course of prehearing activities, as necessary and appropriate to the circumstances of the claim. Although the administrative law judge will retain the authority and ability to develop the record, the adjudication officer will assume the function of ensuring completion of prehearing activities, freeing the administrative law judge to assume the primary function of hearing and deciding claims.

The adjudication officer will have full authority to issue a favorable decision if the evidence so warrants. Administrative law judges will not be required to sign off on adjudication officer decisions.

16. Will the administrative law judge be able to call experts, both medical and vocational, to testify at the hearing?

SSA will continue to rely on medical consultants to provide expert advice and opinion regarding medical questions and issues at all levels of the administrative review process. Medical consultants will be called upon to interpret medical evidence, analyze specific medical questions, and provide expert opinions on existence, severity and functional consequences of medically determinable impairments. The testimony of vocational experts will no longer be required because SSA will no longer rely on medical-vocational guidelines and vocational expert testimony to identify whether work that the claimant can perform exists in the national economy.

17. Who will write the decisions for the administrative law judges?

Adjudication officers and other decision writers will assist administrative law judges in preparing hearing decisions, using the same decision support system employed in the preparation of initial disability determinations.

18. Why didn't you propose getting out of the attorney fee process altogether? SSA is proposing new legislation to get out of the attorney fee process; why didn't you?

The reengineering proposal does not include a recommendation to remove SSA from the attorney fee process because SSA has already proposed legislation to do so.

19. There is a lot of media attention regarding SSA's problems with fraud. How does the proposal deal with fraud?

Although the proposal does not address the fraud issue directly, it does deal with the quality assurance and program integrity aspects of the disability determination process.

In addition, the proposal calls for SSA to develop and enhance relationships with third parties to assist claimants as an alternative for claimants who currently deal with third parties who may commit fraud or take advantage of them.

20. There has been a lot of media attention about SSA paying drug addicts and alcoholics, as well as concerns about children collecting SSI benefits, and the lack of agency action on CDRs. Does your proposal fix these problems?

Our mandate was to examine the disability process itself, and not address postentitlement issues such as CDRs or vocational rehabilitation, so we did not get into the CDR

issue. As far as other issues receiving media attention such as SSA paying drug addicts and alcoholics, and children collecting SSI benefits, the focus of the proposal is primarily on process, not the program, which these issues would entail.

21. There seems to be a range of opinions as to whether the proposal will increase or decrease allowances. Are you really convinced the proposal is cost neutral from a program cost perspective?

The team's mandate from the Executive Steering Committee was to remain neutral with regard to program costs. There are still many details remaining to be developed regarding the methodology, but our goal is to remain cost neutral. As the details of our methodology become more definite, we will conduct a study of cases that have already been allowed or denied under the current process, comparing outcomes under the proposed process. This will provide us more tangible information about the impact of our proposed process.

22. Will pre-effectuation review be eliminated?

Yes; by building quality into every level of decisionmaking for allowances and denials, as well as medical and nonmedical issues, SSA will be accomplishing more to ensure the integrity of the administrative decision process and national uniformity in the adjudication of disability claims than it does today with the pre-effectuation review.

23. The process is not broken; we just need more employees.

During its research, the team came to the consensus that the mere addition of staff would not significantly "fix" the problems that exist in the current process. The process was designed 40 years ago. It was based on assumptions about demographics, customer needs, national job markets, the medical community, and a level of technology that no longer apply.

Public confidence in SSA has eroded for reasons such as process fragmentation, process complexity, lack of communication with decisionmakers, confusing claim decisions and notices, the feeling that attorneys are needed to assist with the appeal of a decision, and the length of time it takes for decisions to be made and effectuated. Although additional staffing might address some of these issues, the overall impact would be minimal. Drastic change is the only solution to restore public confidence and improve the level of service we provide to the public.

24. Why did the team blame the employees working within the current process for the problems that exist today?

The team has received comments from various employee types in SSA and the DDSs that they perceive this proposal to be an indictment of their performance. The team has heard this from claims representatives, disability examiners, administrative law judges, and processing center employees.

The team took great pains to avoid placing blame with any component, job position, or individual. In fact, the team believes the problems of today are specifically attributable to the design of the process as it has evolved over the years.

Internal and external forces have come to bear for various reasons since the 1950's, when the disability program first began. These forces have led to incremental changes which brought inconsistencies and inefficiencies into the program. Nothing less than a total redesign of the program will address these problems.

Subject: Disability Process Redesign
 Proposal of the Reengineering Team; SSA Pub. No. 01-002

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INTRODUCTION

The report of the Disability Process Reengineering Team (SSA Pub. No. 01-002) entitled "Disability Process Redesign" dated March, 1994 lists me as a resource for what is contained in the report. I was interviewed twice by the team; first by Mary Doyle by telephone, then by Ralph Perez and Bryant Chase in my office.

In the words of John L. Lewis of the C.I.O. to William Green of the A.F. of L., I disassociate.

Virtually none of the content of the report presented to Congress represents what I told the Reengineering Team.

My primary concern with the Report of the Reengineering Team is the inadequacy of the design concept. I will use some detail from the Report as illustrative of the flawed design concept which resulted in a call for "doing things differently" without first examining the purpose of the Social Security Act.

THE DESIGN OF THE STUDY

Personal Statement

For the information of the Committee, I have a background in program organization, development, review and reengineering. I performed work for System Development Corporation, the Office of Economic Opportunity, the Institute of Industrial Relations at U.C.L.A., the Department of Labor, and other Federal and County departments. All of the work was in the area of conceptualizing, designing, evaluating, and/or upgrading social service systems. I am fully conversant with, among others, the "Program Planning and Budgeting Technique" originally formulated at System Development Corporation, and "Program Evaluation and Review Technique", originally designed by Admiral Rayburn for a missile system. The Reengineering Team used the technique of "ignore program purpose, decide on detail, feign support."

A Proper Methodology

It is essential, even when working with a small system, to know and have set out every detail of the existing system. A change in any part of an existing system, especially one that has evolved over a long period of time, will necessarily impact on the remainder of the system. Systems work as organic wholes; they do not work with parts isolated from each other. In systems design, this description of the existing system is called the "Zeroth" step.

If one is even going to contemplate changing a system, the Zeroth Step is indispensable. Without a description of the existing system, a change in a part of the system could easily result in a collapse of the entire system.

A description of the existing system, however, is insufficient as a complete starting point, as the system is generally described merely as an operational vehicle. The questions which are not raised at the Zeroth Step are: (1) What is the purpose of the system? (2) How does the existing system operate to serve the purpose? (3) By what routes or alternate routes can the purpose of the system be served as it presently exists?

In systems terms - as applied to worker entitlement programs - a study for action program must set out a:

1. Statement of Mission (Purpose);
2. Statement of Goals;
3. Imposed Conditions;
4. Statement of Resources; and
5. Methodology for documentation and testing.

The Reengineering Team has ignored virtually every element of system design.

As the Team stated in its "Memorandum" dated March 31, 1994,

".... the objective for the team's proposal were: to make the redesign process 'user friendly' for claimants and those who assist them, to make the right decision the first time, to make the decision and pay claims quickly, to make the process efficient, and to make the work satisfying for employees."

The Team failed to address the purpose of the Disability Section of the Social Security Act and to relate what it was proposing to that purpose. In failing to do so, the proposal became little more than a cost cutting plan, without consideration of the impact upon those wage earners who have paid into the system and are no longer able to work. Admittedly, some of the procedural recommendations may better effectuate the purpose of the Act. Unfortunately, we cannot know from the Team's Proposal whether they will or not, as the purpose of the Act is not mentioned in the report.

THE PROPOSED SYSTEM

The system proposed by the Reengineering Team, substantively, turns the Social Security Disability Act on its head.

The Act currently requires that a person demonstrate the he or she is unable to perform any work that exists in significant numbers because of a medically determinable impairment or combination of impairments which could be expected to last for 12 months or result in death.

The "Index"

The Proposal of the Reengineering Team eliminates the question of whether or not a person could work and supplants that with the sole consideration being person's medical condition. This, in the Proposal, is called the "Index".

The Reengineering Team states that the Listing of Impairments should be eliminated. [The Listing of Impairments describe conditions which are presumptively disabling.] What the Team has done is to take the Listing of Impairments into the back

room and repackage them with the label "Index".

The "Index", as it defines conditions which would prevent a person from engaging in any type of work, is nothing more than the Listings without detail. The Ninth Circuit Court of Appeals has already determined, in effect, that the inability to perform the full range of sedentary work is the equivalent of meeting the Listing of Impairments. Ruff v. Sullivan, 907 F.2d 915 (9th Cir. 1990)

Even more importantly, the "Index" does not take human beings into consideration. A person who has labored out of doors for 30 years, is 50 years old, and has a back and arm condition that prevents his or her continuing that kind of work may well not be able to perform work as an electronics assembler. The person will likely have developed a heavy musculature in the course of work which prevents fine manipulation. A person who has performed sedentary work as a telephone operator and has a nonremediable, although incomplete, hearing loss may not be able to work out of doors as a laborer or hod carrier. The neurosurgeon who has a disorder causing his or her hands to shake may not be able to adapt to work as a nurse's aid.

Unless the disability program takes the ability of a person to work into account, it is not fulfilling its mandate. A change in the rules which simply eliminates great numbers of otherwise qualified people from receiving the benefits to which they are entitled amounts to breaking faith with the promise given to people when they paid into the system.

Elimination of Reconsideration

The Reengineering Team has suggested eliminating the Reconsideration step of the sequential analysis. The rationale for elimination of this step is that decisions are rarely changed at this level of appeal.

There has been inadequate development of the importance of the Reconsideration step of the sequential analysis. While this step presently makes determinations in the same manner as the determinations are made at the Initial Application stage, the fact that this is the current practice does not cast the practice in stone. With an analysis of the Reconsideration step in light of a properly formulated Statement of Mission, this could be one of the most important steps in making proper decisions without having to go to a hearing.

Assume, for example, that a Statement of Mission was:

"To promptly and properly analyze the case of a claimant for Social Security Disability benefits based on all of the evidence available, taking into consideration a person's age, education and work background."

With this as a Statement of Mission, the Reconsideration step of the sequential analysis would allow the claimant for benefits to explain to his or her "claim manager" what evidence was not present in the decision which was initially made; what educational or vocational limitations he or she had that made performance of either past relevant work or alternative work nonfeasible, and the impact of age on the ability to adjust to alternative work. The "claim manager" would then undertake development of the claim from the standpoint that missing evidence should be inserted into the file and, very likely, a vocational resource should be consulted to run a vocational profile and a transferable skills analysis. [There are many computer programs on the market which can do this taking 15 - 30 minutes per client.]

The result of a complete development of the file at this stage might well result in a changed decision. At minimum, if the case was appealed to the hearing stage, the file would be complete. A complete file would obviate the need to create a new staff position in the person of the "adjudication officer", as very little prehearing development would be necessary. Indeed, the common cry [even echoed in the Report of the Reengineering Team] is that the administrative law judge is looking at a different file than was seen by the examiners at the Initial and Reconsideration stage. This complete development at the Reconsideration stage would, at minimum, quiet that excuse for the high number of reversals at hearing.

Therefore, I oppose doing away with the Reconsideration stage until there is further exploration into what beneficial purpose it might serve.

The Appeals Council

The elimination of the Appeals Council has also been inadequately considered.

The Appeals Council functions as a buffer against potentially enormous Equal Access To Justice Fees as well as the District Courts issuing reversals rather than remands.

The problems with the current operation of the Appeals Council, among others, are: (1) the decision making process is slow; (2) the affirmations of the Appeals Council are not made from a litigation standpoint; (3) the orders on remand from the Appeals Council are flaunted by the ALJ's; (4) the Appeals Council is reticent to reverse cases; (5) the Appeals Council does not use its own statistics on judges whose decisions are likely to be reversed or remanded by the District Court.

The benefit of the Appeals Council, from the standpoint of the Administration, is that there is an opportunity to review a case for the most egregious errors before daring a claimant to appeal his or her case to the United States District Court. This final review saves the Administration a great deal of money in *Equal Access To Justice fees as well as salary to its counsel.

If an appeal was made from the decision of the administrative law judge directly to the District Court, under the system proposed by the Reengineering Team, the Appeals Council would then have a chance to say, "Wait! We blew it. They are really serious about this. We had better take another look." This type of "Dare you. Dare you. Double D dare you." administration of a government disability system strikes me as oppressive, at best. At worst, it is a denial of equal protection as, once having filed in District Court, a claimant is not given the option of saying, "No! I don't want a new hearing. I want a decision by the District Court and payment of my benefits."

As I could easily envisage an equal protection case quickly being brought under the new Appeals Council rules, and Claimant's being given the right to pursue their cases in the District Court, the likely results would be as follows: (1) liability on the part of Social Security for enormous Equal Access To Justice fees; (2) a marked increase in reversals, as opposed to remands, by the United States District Court.

Again, the purpose and function of the Appeals Council has to be assessed in relation to serving a purpose. Even if the sketchy Statement of Mission that I have set out above is accepted, at least it is a purpose to be served. The question then becomes, "How does the Appeals Council serve the purpose and/or how can it be made to serve the purpose?" The question has been neither asked nor answered by the Reengineering Team.

Collection of Evidence

The Reengineering Team proposes that a claimant for benefits be an active participant in bringing evidence into the "claim manager". While this is a nice idea, it is certainly based on some system that I have not encountered in over 22 years of practice in this area of law.

Typically a claimant for benefits has received treatment as a result of one or more injuries. He or she was treated for those injuries by a treating physician(s), examined by examining physician(s) if the injuries result in litigation, and has access to none of the records. The physicians and attorneys ask from \$25 to \$200 to copy and send the records, if they will do so at all. If a person's disability is not caused by an injury which has resulted in litigation, the person may be treated by either a public or private physician and hospitals. Again, copying costs are very high for a person who has no income. If a report is requested, unless the physician is one of the rare benevolent types, the cost of a report might range from \$250 to over \$1,000.00. Again, not a cost within the reach of an ordinary person who has no income and is disabled.

While the "idea" of having a claimant for benefits bring in his or her records has merit, the idea is not grounded in reality.

As I suggested to the Reengineering Team, nearly every claimant for benefits has had a treating physician at one time or another. Most treating physicians have treated the person for the condition which disables the person, but treatment stopped either because no further treatment would remedy the condition or the person ran out of money. In order to make a proper and knowledgeable decision, the "claim manager" should contact the treating physician and arrange for an examination and report at a reasonable cost. The cost should be borne by the Administration when the claimant for benefits is without the funds to pay.

Presently, when there is no fast response from a treating physician, who is offered the generous sum of \$25 for an examination and report, a person is sent to a mass provider of examinations who generally writes the report before seeing the person in order to save time. That examiner is paid \$97.00, although the examination is most often worth less (worthless?). Most importantly, the reports of mass providers who a person sees on a one time basis do not provide the depth of knowledge of the interaction of multiple impairments on a person that a report from a treating physician would give.

Therefore, rather than unrealistically expect that a person is going to file a claim for benefits with a load of medical records in hand, look to the "claim manager" to help the claimant develop the medical documentation of his or her problems that is necessary for an adjudication of whether or not a person can work considering his or her age, education, work experience and limitations.

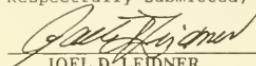
SUMMARY

There are many other proposals of the Reengineering Team with which I disagree. These have been covered in the submission by the Social Security Committee of the Los Angeles County Bar Association and other organizations that have sent their comments.

Undertaking a study which would address the very real problem of inaccurate decisions which are made too slowly is laudatory. It is unfortunate that, with all of the time and money that were expended in this study, the design of the study was ignored.

With all due respect for the Reengineering Team, I must urge Congress to direct the Team to go back to the drawing board and try to get it right the second time.

DATED: April 27, 1994 Respectfully submitted,


JOEL D. LEIDNER
Attorney at Law

**COMMENTS by the SOCIAL SECURITY SECTION of the
LOS ANGELES COUNTY BAR ASSOCIATION
to the Disability Process Redesign of the
SSA Disability Process Reengineering Team**

INTRODUCTION

The Social Security Section of the Los Angeles County Bar Association applauds the efforts of the Social Security Reengineering Team in its investigation of problems within the Social Security Disability Program. The Section joins with the Social Security Administration in its concern for fair, expeditious decisions based on the best evidence available.

The Los Angeles County Bar Association is the largest voluntary organization of attorneys in the United States, with over 26,000 members. The LACBA is concerned with the problems of the general community, and the needs of attorneys. The LACBA has taken positions on Social Security matters in the past at the suggestion of the Social Security Section. The Section's recommendations on the proposed Reengineering of Social Security will be brought to the LACBA for final action.

The Social Security Section strongly supports many parts of the reengineering proposal, in particular the effort to streamline processing of claims at the initial level. At the same time, the Social Security Section is concerned with several aspects of the reengineering proposal.

First, the Section is concerned with the conceptualization of the reengineering proposal, which goes beyond the Team's mandate.

Second, the Section is concerned with proposed substantive changes, which appear inconsistent with the underlying purpose of the Social Security Act.

Third, the Section is concerned with some proposed procedural changes, which are potentially contrary to a just outcome in a non-adversarial proceeding.

The Reengineering Team was authorized to examine the administration of the disability program and to make recommendations to the Administration and Congress on ways to streamline the process. The Team was specifically restricted from changing the definition of "disability" or the method by which the substantive issue of disability is decided. The Social Security Section is gravely concerned that the recommendations of the Team exceeded its mandate.¹

In the words of Judge Shirley Hufstedler, formerly of the Ninth Circuit Court of Appeals, "The Social Security Act created expectations among contributors to the insurance fund that they would be protected in case they became sick or were injured and could no longer work. To deny benefits in [a case in which all evidence leads only to the conclusion that a person cannot work] would be breaking faith with the promise of the Act." Walker v. Mathews, 546 F.2d 814, 821 (9th Cir. 1976) Any changes which cause the denial of benefits to deserving disabled individuals, even if implemented under the guise of streamlining the process or making the program more "user friendly", are unacceptable and must be opposed.

THE DEFINITION OF DISABILITY

The proposed Disability Decision Methodology (i.e. the new standard) violates the statutory requirement that age, education and work experience be considered in the disability determination process.

¹ Congress will note that there was no data collected by the committee with respect to substantive changes. Both times that the author of this section was interviewed, he was specifically cautioned to not address changes in the substantive definition of disability or the manner in which disability was determined. The interviewers were Ralph Perez, Bryant Chase and Mary Doyle.

The proposal to abolish the existing Listing of Impairments and eliminate the existing Grids, in fact, is a proposal to scrap the substantive disability standard, which has evolved over decades through judicial law and agency regulations. First, a thorough reform of the process proposed by the Reengineering Team does not require an alteration in the substantive standard which will be applied at the point of decision in each claim. Second, to the extent that it can be determined from the proposal, the Team's suggested replacement for the existing disability standard would appear to mandate denials of large numbers of deserving claimants who would properly receive disability benefits under current law. Third, because the controversy sure to be generated by this part of the proposal would take years to resolve, and because of the sheer technical challenge of completely rewriting the regulations which implement the disability standard, the salutary process reforms would be seriously delayed or even derailed by their association with the proposal to change the disability standard.

Congress has statutorily defined disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which will last at least 12 months or result in death. 42 USC Section 423(d)(1)(A). The statute further provides that a claimant's impairment(s) must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy," with the latter phrase defined as "work which exists in significant numbers..." Section 423(d)(2)(A). Children whose impairments are of "comparable severity" to those which disable adults and whose income and resources are low enough, qualify for SSI childhood disability benefits. Sullivan v. Zebley 110 S.Ct. 885 (1990)

Over the last several decades, SSA has written and refined regulations to implement the statutory standard of disability. For an adult claimant who is not working and has significant medical impairments, there are two issues under the existing regulations.

First, if the claimant has medical conditions so serious as to prevent work no matter how young, educated or skilled the individual may be, he or she will be found presumptively disabled based on the Listing of Medical Impairments. The agency has had adult Listings for four decades, but they have been subject to major improvements, revisions and additions over time. The childhood Listings were first published in 1977, and have also undergone significant revisions since 1990. Both adult and childhood Listings are purposely set a higher level of medical severity than that required to prove disability under the statute; this give SSA a method of quickly and efficiently screening the most severely disabled claimants.

The Reengineering Team's proposal to abolish the current Listing of Impairments for adults and children and to replace it with an "Index of Disabling Impairments" which will contain fewer impairments and less articulation of standards, will result in less favorable decisions for claimants with critical conditions. Moreover, the Team proposes to prohibit any consideration of a claimant's actual functioning, and to abolish the concept of "equivalence" to the Listing, which has long been used to allow benefits to severely disabled claimants with unlisted impairments or combinations of impairments.

Second, for adult claimants whose conditions are not at the level of severity represented by the Listings, but who are nevertheless unable to return to past relevant work, the law now requires analysis of whether they are able to perform other work in the national economy through the Medical-Vocational Guidelines, or "Grids." The Grids, which were published as formal regulations in 1978 and informally used by the agency for many years earlier, are a series of matrices which incorporate four factors: age, education, work experience and physical residual functional capacity. The Grids take administrative notice of the existence of jobs in the national economy at various level of physical capacity, given the adverse effects of advancing age, poor education or illiteracy, and diminished or nonexistent work skills. For claimants with solely exertional (physical) impairments, the Grids are dispositive of the disability decision; for those with non-

exertional² and/or mental impairments in addition to exertional limitations, they provide an analytical framework but are subject to rebuttal. The validity of the Grids was upheld by the Supreme Court over ten years ago. Heckler v. Campbell 461 U.S. 458 (1983)

For child claimants whose impairments do not meet or equal the Listings, there was no analogous functional assessment at all until the Supreme Court ruled in 1990 that the failure to provide one unlawfully disregarded the "comparable severity" standard in the statute. Subsequent to the Zebley, supra, decision, SSA has spent several years developing new regulations (completely finalized only seven months ago) which provide for an individualized functional assessment of children in all relevant areas of development and functioning, and which result in findings of disability only where the child's impairments substantially reduce his/her ability to function "independently, appropriately and effectively in an age-appropriate manner." 20 CFR section 416.924(e)

For all those claimants whose impairments are not at the level of severity established by the Listings, as well as for those claimants whose currently listed impairments would no longer be contained in the "Index", the Team proposes a new last step of the evaluation: "Ability to Engage in Any Substantial Gainful Activity" (or for children, Comparable Severity to Adult Ability to Engage in Substantial Gainful Activity"). For adults, the Team proposes to abolish the Grids in their entirety. Whereas the Grids reflect the effects of a claimant's advancing age on his/her ability to work through age categories of 18-44, 45-49, 50-54, 55-59, and 60-64, the Team's proposal would ignore such differences for most claimants. The proposal would establish only two age categories: "nearing full retirement," and everyone else.

Under the Reengineering Team's proposal, the Administration largely could ignore the effect of age, education and vocational training on claimants with severe medical impairments. While the Team acknowledges the adverse impact of age on individuals close to 65 years of age, the Team would treat a 26 year old claimant and a 56 year old claimant with the same impairments equally. It is ludicrous to find that a 56 year old woman with a marginal education and a history of unskilled work, who is limited to sedentary work sitting for most of the work day, would have any chance of sustaining competitive employment in our national economy. In this regard, the Team's proposal abrogates the statute's command that the vocational impact of age, education and work experience be considered. Similarly the Team fails to acknowledge the importance of consideration of past work experience and skill level on the ability to perform work. As the Team proposes to eliminate the grids, and as the new functional determination is aimed at whether a claimant can perform a "baseline" level of work, it can only be assumed that the assessment will be purely medical, and that vocational expertise will no longer be relied upon. This is directly contrary to the definition of disability as formulated in the Social Security Act, and will not withstand judicial scrutiny.

We are also concerned by the suggestion that the Americans' with Disability Act (42 USC 12101 et. seq., hereinafter ADA) is to be made a part of the disability evaluation process. The Team suggests that "reasonable accommodation" is an important vocational factor. Our interpretation of the ADA is that reasonable accommodation describes the relationship between the individual worker and ONE employer and ONE job. Case law, regulations and statutes have always emphasized the importance of a significant number of jobs in the national or regional economy. Reasonable accommodation under ADA is at best an ad hoc determination specific to one worker and one job with one employer. As yet, there is no national standard for what constitutes reasonable accommodation.

Before the provisions of the ADA are made a part of the disability determination process, further study is necessary, subsequent to the development of a body of law on just what constitutes "reasonable accommodation".

It is difficult to overstate the extent to which the Team's proposal would depart

²eg. environmental, postural, manipulative, pain

from current law³. The Team's report contains no data to support such radical change, which would contradict settled rules of adjudication which SSA has been using for years.

With respect to children, the effect of the Team's proposal is less clear. However, it suggests that the current approach to childhood disability, which has been developed by SSA after considerable time and effort over the past four years, "may not appropriately define how much functional loss or interference with growth and maturity is comparable to inability to perform any substantial gainful activity." Thus, the Team proposes to scrap the newly promulgated regulations and start from scratch to develop "baseline criteria" comparable to those developed for adults. Given the evident direction of the changes contemplated in the adult standard, we can only assume that the outcome of such an effort would be a standard of childhood disability more strict than current law provides. It is difficult to imagine a more wasteful exercise than the one in which an agency which has only just completed a process of convening outside experts in pediatrics and related fields, drafting and publishing interim and final regulations, considering public comments, monitoring implementation, and publishing final regulations, would now be expected to commence the same process once again in the service of the "reengineering" concept.

In summary, the Team's proposal to radically alter the substantive standard of disability for adults and children is unnecessary to its mandate to make the system more efficient and to ensure fairness in decision making.

PROCEDURAL ISSUES AT THE INITIAL LEVEL

It is in the area of procedural changes where the Team expects to have the greatest impact on the current disability program, but many of the proposed changes undermine the security, not only of the claimants, but also of the Judges who will decide the claims. The Social Security Section has carefully reviewed the proposed changes and offers the following critique.

The Social Security Section wholeheartedly supports the elimination of the reconsideration level of appeal, which is unnecessary.

The Reengineering Team's proposal provides for a Disability Claims Manager, headquartered in the District Office, to explain all aspects of the Title II and Title XVI disability claims to the applicant, secure the initial simplified application, insure that relevant medical sources are contacted, and make all vocational and disability determinations.

The Social Security Section supports this concept, which we believe could make the process more accessible to the claimant, but is concerned that it might be necessary to hire many new personnel at considerable cost to the government⁴. The Social Security section is also concerned that time pressures might encourage Disability Claims Managers to turn down claims without fully developing the medical evidence⁵.

For example, the Team states that persons with obviously non-disabling impairments, e.g. a simple fracture, will be turned down without developing the medical record. But what of the individual who has limited medical knowledge, or limited English ability, or a psychiatric impairment, and is not wholly versed in his/her medical condition.

³Under the Grids, claimants between the ages of 50 and 54 with limited education, no transferable work skills and physical impairments limiting them to no more than sedentary work are found disabled. Similarly, claimants age 55 and over with limited education, no transferable work skills and physical impairments limiting them to no more than light work are found disabled. It appears that the Team's proposal would change the decision to "not disabled", for virtually all of these claimants.

⁴Note that financial constraints have caused Social Security to reduced its work force by 20% in the past few years. It is questionable if the agency will be able to hire enough personnel to implement these proposals.

⁵Social Security has had, for the past six months, several pilot projects similar to the Veterans Administration, in which one individual trained by State Agency personnel has handled all aspects of an individual's claim. This process is so time consuming that one highly trained individual so handling a claim, cannot handle more than one claim per day. (Veteran's Administration Demonstration Project, as implemented in the Miracle Mile Social Security District Office, Los Angeles, California)

When asked to describe his/her disability, an individual might list "fracture," when in reality he/she has a medical condition such as osteoporosis, resulting in series of fractures. If the Claims Manager fails to properly assess the impairment because the claimant describes what appears to be a non-disabling condition, the program has failed to meet that claimant's need for disability benefits. The Section is also concerned that the Claims Manager may not take a claim, based on an initial assessment that the potential claimant does not meet the criteria for disability, and will issue an "informal denial." In order to preserve due process rights, any changes must incorporate the absolute right to have a claim taken, and the agency's obligation to formally notify the claimant in writing of any decision.

While it certainly would be helpful to both claimants and their representatives to have one claims manager handle all aspects of the case, we question if this individual could be initial intake person, fact finder, claims developer and final adjudicator.

While we support the opportunity for claimants to have a personal interview with the Disability Claims manager, it should be at a point in the process before a decision is made to deny, so that the claimant can pursue further medical development if necessary. We support the concept of the face to face meeting with the disability claims manager, but question why it is called a "Pre-Denial interview."

CHANGES AT THE OFFICE OF HEARING AND APPEALS

The Social Security Section opposes the proposed changes to the Administrative Appeals Process set forth in the Proposal. This opposition is based upon three factors:

- 1) The proposal minimizes the role of the Administrative Law Judge (ALJ), and threatens the independence of the ALJ guaranteed under the Administrative Procedure Act (APA);
- 2) The proposal compromises the due process rights of the claimant; and,
- 3) The proposal will result in increased need for attorney representation of the claimant rather than the decreased need urged by the proposal.

Currently, after a claim is denied at the Reconsideration stage, a claimant must request an administrative hearing within 60 days. At the hearing level, the hearing office staff, under the direction of the ALJ, prepares the exhibit file and develops additional evidence. Regulations provide that the ALJ may meet with the claimant or the claimant's representative in a pre-hearing conference in order to narrow the issues to be decided at the hearing. The ALJ may request that a staff attorney confer with the claimant or the representative in order to enter into stipulations, or to insure that necessary evidence is procured. Pre-hearing determinations are entirely within the jurisdiction and discretion of the ALJ.

Under the APA, the ALJ is an independent decisionmaker. The ALJ must impartially review the agency's decision and must fully and fairly develop the record. Federal Courts have ruled that this duty remains even when the claimant is represented by counsel.

The Proposal introduces a second decision making officer within the hearing level process, an "Adjudication Officer" (A.O.). The AO would become the initial and primary contact for the claimant at the hearing level. The A.O. would identify the issues in dispute, determine whether there was a need for additional evidence, conduct informal conferences with the claimant or representative, and would have authority to issue a favorable decision. The A.O. would also "consult with the ALJ during the course of prehearing activities, as necessary and appropriate to the claim." The A.O., not the ALJ, would determine that the case was ready to proceed to a hearing, and would also set the date of the ALJ hearing.

While the Proposal states that the ALJ would retain the authority and ability to develop the record, the proposal also admits that most, if not all, of the prehearing activities would be handled by the A.O. Effectively, the ALJ's role would be reduced to that of a reviewing body; the ALJ would merely reconsider the facts, as they were developed and found by the A.O..

The ALJ's ability to develop the record would also be compromised by the fact

that the AO would be obliged, under the Proposal, to set the hearing date 45 days after the hearing request. The ALJ would have very little time to determine whether there were additional issues and to procure additional evidence.

Effectively, the A.O. would assume the present role of the ALJ. There is no indication, however, that this officer would have the proper background and training necessary to fulfil these duties. The Proposal states that the "Adjudication Officer will have the same knowledge, skills and abilities as the adjudicators who decide claims initially" and will "also have specialized knowledge regarding hearings and appeals procedures." By the criteria set forth in the Proposal, it would not be necessary for the A.O. to be an attorney or to have the same fact finding skill as an ALJ.

Because the A.O. would continue to communicate with the ALJ after the A.O. had made a determination that the claimant was not disabled, the serious issue of *ex parte* communication arises. The ALJ is not making an independent decision when he or she is in constant communication with the officer who has developed the record, performed substantially all of the fact finding functions, and has decided that the claim is not meritorious. Once the A.O. decision has been made, the A.O. would inevitably act as an advocate for the agency's position. Although the Proposal does not contemplate that the A.O. would actually attend the hearing as the agency's advocate -- an egregious practice which was tried, and which failed, in the 1980's -- the presence of an agency advocate within the OHA would create an adversarial process at the hearing level.

Therefore, the Los Angeles County Bar Association Social Security Section opposes the introduction of the Adjudication Officer into the hearing process. The claimant now waits too long for the hearing. Other remedies are available which do not impair the function and independence of the ALJ. The ALJ should be encouraged to use the pre-hearing conference and to institute a motion calendar such as is used by Federal Judges.

The due process rights of the claimant are compromised by the Proposal in three ways. First, the Proposal shifts the burden of developing evidence to the claimant or the claimant's representative. This shift is contrary to the long-time intent of Congress and the Social Security Act. Certainly this shift of burden would speed the decision making process if the 45 day rule is followed, but to the detriment of the claimant. The proposal indicates that 40% of the applicants for disability benefits are welfare or AFDC recipients. This means that a significant number of disability claimants are indigent individuals -- individuals who historically receive inferior medical care and have less access to reliable medical evidence. It is longstanding policy in the federal courts that the inability to obtain or pay for medical treatment cannot be used as the basis for denying the severity or the presence of a medical condition. To shift the burden of developing the evidence to the claimant penalizes the claimant for his/her indigence.

Second, as noted above, the hearing procedure outlined in the Proposal becomes a *de facto* adversarial proceeding following the review by the Adjudication Officer. The claimant in effect, must argue against the determination made by the A.O. rather than present a *de novo* claim to the ALJ.

Third, the Proposal does away with the claimant's right to request review of a denial by an Administrative Law Judge to the Appeals Council, as set forth more fully below.

CHANGES AT THE APPEALS COUNCIL LEVEL

The Appeals Council has been an essential part of the disability evaluation process, and should continue to be so. As the final administrative level of adjudication, this unitary body is best able to ensure uniformity of decisions within the evaluation process. This provides a necessary consistency in a Federal System implemented by many Administrative Law Judges in the various regions of the country. Thus, the integrity of the program, the policies of the Secretary, can be applied evenly across the country.

From the claimant's perspective, also, the Appeals Council is important. An unfavorable, improper decision can be appealed easily and inexpensively without the need to engage an attorney or incur court costs. Furthermore, as the process now stands,

a claimant may submit additional relevant evidence to the Appeals Council. This is important in providing due process for several reasons: If the claimant was unrepresented at the hearing, and then retains an attorney, new relevant evidence may be submitted which may alter the administrative decision. Even if represented at the hearing, new evidence may surface after the hearing, which should be considered by the administration before denying a claim. The Proposal indicates that some 27% of the time, the Appeals Council remands a decision back to an ALJ at the request of a claimant. Though not mentioned in the Proposal, the Appeals Council reverses and pays 3% of the claims it is requested to review. The proposal therefore deprives the claimant of an administrative remedy which has benefitted the claimant at least 30% of the time.

Under the Proposal, the Appeals Council will only review a case after the claimant files civil action in federal court. Only at that time will the Appeals Council determine whether it "wishes to defend the ALJ's decision as the final decision of the Secretary." Thus, to obtain the level of review currently available to the claimant by appeal to the Appeals Council -- a process which is initiated by filling out a simple form at a Social Security field office -- the claimant would have to enter into the very complex milieu of federal court. Because this process is so complex, it is nearly impossible for the claimant to appeal on her own. Essentially, she can only appeal with the assistance of an attorney.

The elimination of the right to appeal to the Appeals Council would be cause for alarm by the United States District Courts as well. Social Security cases constitute a substantial bulk of the courts' case load now. By eliminating the Appeals Council, thousands of additional cases will reach the United States District Court. Cases which could have been resolved administratively would be appealed as a matter of course to United States District Court, which would increase, rather than decrease, a claimant's need for an attorney.

The Appeals Council as the ultimate step in the administrative process must be kept intact. To eliminate this step would undermine a claimant's right to due process, would overburden the Federal Courts, and could lead to marked inconsistency of decisions in the various regions of the country.

THE ROLE OF ATTORNEYS

Representation of claimants is not regarded by the Secretary as a positive good. The Team starts from the premise that attorneys get too much money under the current system, and minimizing the role of attorneys is an explicit objective. The Team treats the Administrative Law Judges and attorneys similarly in that both legal profession are diminished. In an effort to reduce the role of attorneys (and attorney fees), the Team proposes safeguards against representative overcharging for presumably less than necessary services⁶. These safeguards include establishment of qualifications, establishing a code of professional conduct "for representatives in all matters before the SSA" including conduct at pre-hearing conferences, hearings, and interaction SSA employees and claimants generally", defining the duties and responsibilities of representatives, including the duty to fully develop the record in a timely manner and respond to the request to submit evidence. Also provided for is a forum for claimants to air their grievances against attorneys.

Under these proposals, attorneys are the only ones who will be held accountable. Nothing is said about a forum where claimants and their representative can grieve against the Agency and its personnel from the district offices through the adjudicative process.

The Secretary urges meaningful sanctions against representatives including suspension and disqualification for the violation of any provisions contained in the rules of representation, which have not been identified. This suggestion is unnecessary for

⁶The high reversal rates in which represented claimants are granted benefits after hearings and litigation is the only proof needed of the competence of and need for attorney representation. The Expedited Fee Agreements providing for the lesser of 25% of past due benefits or \$4,000 has resulted as of 1993 in an average fee of \$2,800.00.

practicing attorneys who already are committed to an ethical code and legal requirements by which Agency personnel are not bound.

The Section is concerned about the provision that the Agency shall "define the duties of representatives, including the duty to fully develop the record in a timely manner and to respond to requests to submit evidence". It is doubtful that this requirement will produce the desired results, as discussed more fully above.

The new process proposed is characterized by the agency as simplified and user friendly, but will not reduce allegedly inflationary fees caused by long delays, as it will be the engine which drives many more cases into the federal courts. It will result in more claimants pursuing their claims without representation which will likely mean fewer awards of benefit. The Team is concerned that representatives be qualified, a position with which the Section agrees, and that attorneys adequately represent claimants' interests. The bar by law and custom does precisely that. The Team proposes that lawyers and representatives be accountable for their misconduct, which lawyers already are by their legal and ethical obligations.

Lastly, a word should be said of the role of lawyers. The Circuit and District Court decisions which expand the rights of claimants and limit the power of the secretary to deny benefits are the direct result of trial lawyers who in the face of determined and often bitter opposition have hammered out a body of law reasonably calculated to protect claimants' rights. The Secretary now asserts she will protect claimants from lawyers and will provide regulations which insure fair and equal treatment. She is cautioned that a huge body of precedent from the Circuit and District Courts bears the names of many plaintiffs but only one as defendant.

CONCLUSION

In summary, the Los Angeles County Bar Association Social Security Section believes that the **Disability Process Redesign** proposal of the SSA Disability Process Reengineering Team dated March 1994 has several good ideas, but we disagree with the substantive changes proposed, and have concerns about some of the procedural changes.

The proposal to eliminate the reconsideration level of appeal is excellent. Further, the notion of more efficient and faster processing of the initial claim by a Disability Claims Manager is potentially very good, if implemented carefully with adequate training for the claims manager, and with the absolute right by the claimant to file a claim and be formally notified of the decision. We would not like to see the elimination of the Appeals Council level of review, for the reasons set forth above.

The Team's mandate to "redesign [the] disability program policies and procedures, to ensure dramatic improvements in the way the entire process works and is managed to serve the American public" (Report, page 2) does not require the proposed substantive changes in the way disability. The elimination of the Medical listings and consideration of medical equivalence, elimination of the Grids and vocational and age considerations, are all unnecessary to the mandate and all, in our opinion, are calculated to lead to denials of disabled claimants who under current law are granted benefits. Further, these proposed changes will wreak havoc with an enormous body of settled law which has evolved over decades in this field, and lead to more litigation in the federal courts than we currently have. We are also opposed to the introduction of an "Administrative Officer" at the Office of Hearings and Appeals, who will diminish the necessary role of the ALJ and potentially lead to an informally adversarial system of hearings. We are also very much opposed to the shifting of the burden of developing the medical evidence to claimants and their representatives, which we believe will again result in worthy claims being denied due to the inability of individuals to obtain documentation of their conditions. The government has the resources to administer the claims and pay the benefits, it should also retain the resources to develop the claims.

If the Team's intent is to keep attorney fees low or to a minimum, then it is imperative that adequate measures are taken to ensure that truly disabled claimants are awarded benefits initially rather than after appeals and litigation. A system which proceeds from initial denial to hearing in 45 days is not calculated to help the poor bear

their heavy burden of proof. The efficiency sought will result in a final decision coming sooner, and less favorable than can be obtained under the present system with all its faults. After a thorough review of the Team's proposals, we do not see any compelling evidence that the Team's intent will be realized.

Dated: April 27, 1994

Acknowledgements

The executive committee of the Los Angeles County Bar Association Social Security Section collectively reviewed and discussed the Team's proposal, and drafted the Section's comments. Special thanks are extended to Joel Leidner, Louis Finkelberg, Joshua Potter, Tom Siegel, Susan Wasserman, Dean Franks, Judith Leland, and Bertram Potter. Edited by Thelma Cohen and Jerry Persky.

JONI R. MCKENZIE: SSDI RECIPIENT
COMMENTS SUBMITTED TO THE CONGRESSIONAL RECORD
COMMITTEE ON WAYS AND MEANS, SUBCOMMITTEE ON SOCIAL SECURITY

Mr. Chairman, Members of the Committee, my name is Joni McKenzie. I am a thirty-eight year-old SSDI recipient due to cerebral palsy since birth. This condition effects all of my limbs so I rely on a power wheelchair to move around. In addition, numerous secondary complications have developed over the years. For example, I have developed a spinal curvature which, in my case, results in loss of lung capacity which effects my physical stamina. In tests conducted in approximately April 1993, it was determined I am currently not a good surgical candidate to correct this complication. I am unable to engage in any physical activity for more than a short period of time. I have been invited by members of the Committee to submit written comments for inclusion into the Congressional Record to be reviewed by the Subcommittee. I thank you for this opportunity to comment on the Disability Process Redesign Proposal.

I want to thank all members of the Committee and the Reengineering Team for their efforts to make the claimant a full participant throughout the claims process. I support the new concept of dealing almost exclusively with a disability claims manager at the initial level; who would work on the front line. The usage of a pre-denial interview prior to a presumptive denial is an idea which I endorse. It is my hope that this will lead to a greater degree of sensitivity toward the claimant and a heightened awareness of the individuality among disabilities. The proposed idea of issuing a receipt at the completion of the intake interview with documentation as to what to expect from the SSA and anticipated time frames should be helpful to the claimant. I am very glad to see the elimination of the Reconsideration Step. In addition, the Reengineering Team has moved to reduce the time a claimant must wait for a final disability decision. Although I am not acquainted with the appeals process personally, the use of a "statement of the claim" approach in the initial disability decision gives the claimant more detail as to the rationale for the SSA's decision regarding a disability determinate, including evidence during the pre-denial interview. The use of more detailed information written to the claimant, at the completion of this step, may help he/she to make a more informed decision as to whether he/she may want to file an appeal.

Please let me now focus on some proposed areas of reform that I feel could have a NEGATIVE IMPACT on persons with disabilities:

The fact that the proposed Index would have fewer Disabling Impairments could have a negative impact on persons who are currently disabled but whose condition may not be included the new proposed Index.

The proposal to revise one aspect of the Index of Disabling conditions to be one that results in death and be so debilitating that any individual would be unable to engage in SGA despite any work place accommodation done by an employer in accordance with the ADA puts a displaced emphasis on the ADA. The ADA is a civil rights act. It could have profoundly negative results if it were incorporated as a component of the Index of Disabling Conditions to persons with disabilities applying/receiving SSDI and/or SSI. (p.39)

Currently, in the development of a disability claim the SSA takes into consideration the residual functional capabilities left from physical and/or mental impairments of a claimant. Under the proposed recommendations, only functional abilities are measured. In my opinion, it is not appreciate to eliminate consideration of residual function in making a determination of disability. Medical advancements and assistive technology improve and enhance a person's ability to function with a disability but they do not serve to compensate entirely.

As an SSDI receipt who has a congenital disability, I would urge Congress and SSA to include in updated proposals and future legislation the recognition that there are secondary complications to many disabilities and heightened interest in the fact that there also could be AGE related complications with some disabilities. I believe it is for this reason that a person's entire medical history be taken into account. This may relate to proposed changes as to the effect of AGE and a person's ability to perform SGA. (p.43) Please exercise EXTREME CAUTION in removal of the age criteria for person's with a history of long-standing and/or permanent disability.

In closing, I what to thank you for allowing me to share my thoughts on this proposal. I recently had to withdraw from a supported employment program due to some further complications with my disability. I hope that the Social Security Administration will continue to evolve to become an agency to help persons with disabilities reach their full potential. However, it is imperative to realize that we are all individual and the impact of disability is unique to each person in their daily lives. I will never give up my dream to enter the workforce as a part-time worker. I hope with the input of person's with disabilities, Congress and the SSA will begin to see that Social Security Disability and work can go together.

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Ms. Janice Mays
 Chief Counsel and Staff Director
 Committee on Ways and Means
 U.S. House of Representatives
 1102 Longworth House Office Building
 Washington, DC 20515

Re: Proposed Reengineering/
 SSA Disability Process

Dear Ms. Mays:

I have been practicing before the Social Security Administration for almost eighteen years, have handled thousand of claims, and am an officer and a member of the Board of Trustees of the New York Social Security Bar Association. I recently had the honor of appearing before the U.S. House of Representatives Subcommittee on Social Security along with Commissioner Charter, and have studied the "blueprint" proposed by the Social Security Administration to effectuate these changes.

It is clear to me that this blueprint is not intended merely to speed up the decision making process, but it is a very anti-claimant proposal that will serve to discourage those most in need from applying for these benefits. If the time frame proposed of less than 40 days to make decisions is adhered to, decisions will be made without the benefit of consideration of all medical records, as in my experience, overworked and overburdened health care practitioners are unable to respond to requests for medical records in the time that would allow a decision to be made in 40 days.

Furthermore, the new proposal gives the "disability claims manager" the right to advise the claimants at an initial meeting that based on allegations and evidence presented at that meeting (very few claimants are prepared with appropriate medical evidence at this initial meeting) the claimant appears ineligible for benefits, which will no doubt result in fewer disabled people filing claims that in most cases, with appropriate development will prove to be bona fide claims.

Following hearings before Administrative Law Judges, under the new proposal, rather than denied claims being appealed to an Appeals Council, same will go directly into the Federal Court system, inundating an already overburdened understaffed judiciary.

There is always the possibility that if the Courts are forced to pick up this extra case load, eventually, changes may be proposed, as they were in the Reagan Administration, to take away the right of claimants to appeal to the United States District Courts, and thus disabled persons will lose the constitutional right of access to and the protection of the Federal Judiciary.

Finally, under the proposed scheme, the definition of disability will change, and the criteria used to determine disability will move away from a sharply defined process (the current "listings of impairments" and the "grid rules"), and be replaced by an "index of disabling impairments... which will contain fewer impairments and have less detail...", thus making the decision making process far more subjective than it is at present.

Although the Secretary proposes to make the system "user friendly" and expedite decisions through the use of this re-engineering blueprint it appears to me that rather than expedite decisions, this blueprint will result in less claims being filed, greater confusion on the part of claimants, and change in the definition of "disability" and the subjectiveness of the process will surely result in more claims being denied.

In short, this new proposal, rather than shortcutting the endless delays encountered by claimants, which of course do exist, will discourage new filings of applications, and ultimately lead to benefits being denied the disabled. Rather than receiving benefits from the Social Security Trust Fund which should have been set aside for just for this purpose, these claimants will be forced to fall back upon the Social Service system which is funded through tax-payer dollars and will increase the financial burden already incurred by the City and State of New York.

This cannot be allowed to happen.

Very truly yours,



Richard F. Morris

RPM/am



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May 11, 1994

Janice Mays, Chief Counsel
Committee on Ways and Means
United States House of Representatives
1100 Longworth House Office Building
Washington, D.C. 20515

**Re: Disability Process Design:
The Proposal and Background
Report from the SSA Disability
Process Reengineering Team**

Dear Ms. Mays:

New York Lawyers for the Public Interest, Inc. is a law firm which specializes in disability law. Our Disability Law Center provides advocacy services to persons with disabilities in New York City pursuant to the following federal programs: Protection and Advocacy for the Developmentally Disabled, 42 U.S.C. §6041 *et seq.*, Protection and Advocacy for Mentally Ill Individuals, 42 U.S.C. §10801, *et seq.*, Protection and Advocacy for Individual Rights, 29 U.S.C. §794e, and the Client Assistance Program of the Rehabilitation Act, 29 U.S.C. §732. We also assist and represent persons with disabilities and their advocates across New York State. A large part of our advocacy and education efforts focus on the Americans with Disabilities Act.

We have reviewed the report entitled Disability Process Design: The Proposal and Background Report from the SSA Disability Process Reengineering Team and offer our comments on the report's recommendation that the Social Security Administration (SSA) take into account any reasonable accommodations that employers are expected to make under the Americans with Disabilities Act (ADA) in determining whether an individual can engage in substantial gainful activity (SGA).

It is wholly inappropriate for the SSA to make a disability determination based on a non-verified and non-verifiable assumption that employers will make reasonable accommodations for their employees with disabilities pursuant to an ADA mandate. As many employers are not obligated to, or do not in fact, adhere to the ADA reasonable accommodation mandates, the report is suggesting that SSA make disability determinations based on jobs it believes should exist, rather than jobs which actually do exist.

The ADA does not even apply to a large number of employers. Currently, only employers that employ 25 or more employees are covered by the ADA. 42 U.S.C. § 12111(5)(A). As of July 26, 1994, employers that employ 15 or more employees will be covered. *Id.* Those employers that employ fewer than 15 employees will never be covered by the ADA. At a minimum, the SSA must refrain from assuming that employers that are not covered by the ADA are complying with its mandates.

Even for those employers who are covered by the ADA, the obligation to make reasonable accommodations for employees with disabilities is a qualified one. An employer is not obligated to make a reasonable accommodation if doing so would impose an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A).

The sad reality is that even those employers that are obligated to make reasonable accommodations for their employees with disabilities, often do not do so. Although the ADA was passed almost four years ago, and has been in effect for employers with 25 or more employees for almost two years, studies show that many employers are still unaware that they must abide by the ADA's mandates and many do not understand what precisely the ADA mandates them to do. A Gallup poll showed that only 14% of all businesses polled were very familiar with the ADA while 42% admitted they were not at all familiar with it or were familiar with it in name only. The Gallup Organization, Inc., Baseline Study to Determine Business' Attitudes, Awareness and Reaction to the Americans With Disabilities Act (Princeton, NJ: February, 1992). Similarly, a General Accounting Office (GAO) study found "notable lack of awareness of ADA" by businesses, with 47% of those polled being unaware of their obligation to remove barriers to access. GAO/PEMD-93-16, Americans with Disabilities Act: Initial Accessibility Good but Important Barriers Remain (May 1993), pp.6-7. One of the major findings of a report on implementation of the Americans with Disabilities Act by the National Council on Disability was that the area of accommodating employees with disabilities "needed greater attention." ADA Watch -- Year One: A Report to the President and the Congress on Progress in Implementing the Americans with Disabilities Act. (April 1993).

Countless other employers brazenly refuse to comply with the ADA. As of March 31, 1994, the United States Equal Employment Opportunity Commission (EEOC), the agency charged with receiving administrative complaints filed under the employment provisions of the ADA, reports that it has received close to 25,000 complaints of employment discrimination on the basis of disability since the effective date of the ADA (July 26, 1992). Of the complaints received, 24% (or close to 6,000) of the complaints deal with employer refusal to provide reasonable accommodations. Countless other reasonable accommodations cases have been filed in state and federal courts. Many other employees have likely experienced similar problems with their employers but have not filed complaints due to lack of information about filing complaints, lack of resources or fear or retaliation by the employer. Even if all of the claims of discrimination are not sustained, it is clear that all too many employers across the country are refusing to appropriately accommodate their employees with disabilities. SSA disability applicants should not be required to sue potential employers to make SSA's tenuous assumption about employer compliance with the ADA ring true.

The Re-engineering report's ADA suggestion also raises questions of how it will be determined whether or not and how a claimant's disability could be accommodated. Right now, a claimant is obligated to show that s/he is unable to engage in SGA. If the Report's ADA suggestion is adopted, will claimants now have to additionally prove that their disability cannot be reasonably accommodated? How would claimants go about proving this? Even if the burden of proof is upon SSA to show that the claimant could be reasonably accommodated, the question remains as to how claimants could rebut SSA's showing and prove that they cannot be reasonably

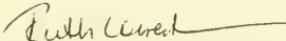
accommodated. The typical posture for a person with a disability seeking an accommodation pursuant to the ADA is to show that their disability can be accommodated, not to show that it cannot be accommodated. It would be exceedingly difficult for SSA claimants to prove that they cannot be reasonably accommodated. Surely, they cannot rely on past employers or other employers to state that they cannot be accommodated as these employers would fear that such statements would lead to prosecution under the ADA. In addition, it would be inappropriate for SSA to set general guidelines with respect to reasonable accommodations, as accommodations are clearly unique to each individual's disability and the particular job in question. See, EEOC ADA Title I Interpretive Guidance, §1630.9.

Not only is the determination of whether a person's disability can be accommodated a highly individualized one, but the determination of whether an employer is obligated to provide an accommodation involves an individualized assessment as well. In order to determine if an employer is obligated to accommodate an employee's disability, one must look at the nature and cost of the accommodation and the resources of the employer, among other factors. 29 C.F.R. §1630.2(p)(2). It would be impossible to make the necessary individualized assessment of whether a person's disability can be accommodated without knowledge of all these factors. It would thus be inappropriate for SSA to make any generalized assumptions about persons with a certain disability or certain types of employers and jobs. Each person, accommodation, job and employer must be considered individually.

We urge the SSA to take note of its own June 2, 1993 Memorandum from Associate Commissioner Daniel L. Skoler which discussed the applicability of the ADA to the SSA program and noted in conclusion that "the ADA and the disability provisions of the Social Security Act have different purposes, and have no direct application to one another."

The inclusion of assumptions about employer compliance with ADA mandates to reasonably accommodate employees with disabilities should be deleted.

Sincerely yours,


Ruth Lowenkron

cc: SSA Disability Process Reengineering Project



PUBLIC EMPLOYEES FEDERATION
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Janice Mays, Chief Counsel
 Comm. on Ways and Means
 U.S. House of Representatives
 1102 Longworth House Off. Bldg.
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Dear Ms. Mays:

We would like to thank you for the opportunity to comment on the Disability Process Redesign proposal and background report from the SSA Disability Process Engineering Team.

As representatives of the nearly 700 professionals in New York State responsible for adjudicating Social Security Disability claims, we are very interested in all aspects of the Disability Program. We share SSA's commitment to improving our capacity to meet the needs of the disabled population while maintaining fiscal responsibility. The scope of the proposal requires careful analysis. We look forward to embracing the positive aspects of the re-design.

Our representative will attend your hearings on this subject. We are developing a more comprehensive response and expect to submit it within SSA's time frame for comment. At this time, we have serious reservations regarding the operational feasibility of the proposal.

Improved processing time cannot be the sole goal of the Disability Program. The primary mission must also include an accurate assessment of the individual's disability. A hastily implemented re-design, while superficially attractive, may ultimately do a great disservice not only to the disabled but to the public at large.

We commend the SSA committee for their sincere effort, and look forward to working with Congress and all interested parties to truly improve the Disability Program.

Sincerely,

Larry Jacks
 Division 192
 Council Leader

**STATEMENT OF SERGEANT MAJOR MICHAEL F. OUELLETTE, USA, (RET)
DIRECTOR OF LEGISLATIVE AFFAIRS
NON COMMISSIONED OFFICERS ASSOCIATION OF THE
UNITED STATES OF AMERICA**

Mr. Chairman. The Non Commissioned Officers Association of the USA (NCOA) is grateful for the opportunity to present testimony to the subcommittee concerning Supplemental Security Income disability determinations. NCOA is a federally-chartered organization with a membership in excess of 160,000 noncommissioned and petty officers serving in every component of the five Armed Forces of the United States; active, national guard, reserve, retired and veterans.

BACKGROUND

Disabled children of low income military families stationed overseas became eligible of Supplemental Security Income (SSI) benefits as part of the Omnibus Budget Reconciliation Act of 1990. Prior to then, these families and their qualifying children lost their eligibility simply because they were overseas on the orders of the U. S. Government.

Representative Jim Slattery (KS) responded to the plight of a young soldier on orders to Germany who was to be accompanied by a disabled daughter who qualified for SSI benefits prior to receiving orders. Rep. Slattery's legislation permitted the military member with a qualifying disabled dependent to continue to receive SSI benefits while stationed overseas and was adopted as part of OBRA 1990.

P.L. 103-66 further addressed specific problems facing military families when it extended the overseas provision to military families stationed in Puerto Rico or territories or possessions of the United States. The law also clarified another provision in the SSI code that had unfairly penalized military families. Although military families certainly considered the military member to still be a part of the family when he or she was absent on an unaccompanied tour or on orders for duty at a distance from the family residence, SSI regulations did not. P.L. 103-66 has corrected this inequity.

CONCERNS

More recently, a number of other problems have become apparent with the administration of the SSI program for military families. One is the inability to determine initial eligibility for SSI when stationed outside of the United States. Correction of this problem is addressed in legislation (H.R. 480) introduced by Representative Slattery. When a child is born overseas with a disability or when a disability is first diagnosed while the family is overseas, the child and the family cannot apply for SSI eligibility. The military member must request a humanitarian short tour and return to the United States or return his family to the United States simply to establish a home and have SSI eligibility determined. The only other alternative for the family is to attempt to complete their overseas tour of duty without the needed economic relief of SSI benefits. Since social workers employed by the military and military physicians are available at duty stations outside the United States, it would seem reasonable to allow these professionals to make a temporary determination of SSI eligibility using criteria and forms required by the Social Security Administration.

The second problem concerns adult military family members who are eligible for SSI benefits within the United States but not when stationed with their military sponsor in an overseas area. These adult family members can be the spouse of the military member or, very occasionally, the dependent parent of a military member. Each military service has an Exceptional Family Member Program (EFMP). All servicemembers with a disabled family member are required to register their family with the EFMP. Registered families are screened before they are sent to duty stations to ascertain that needed medical and other services are available for the disabled family member. This is particularly true for duty stations outside the United States where services from the private sector may be limited or non-existent. If the required services are not available, either the military member is assigned to another duty station where the needed services exist or is assigned outside the United States in an unaccompanied tour status. It is obvious that the number of servicemembers with a disabled adult family member; have a family income low

enough to qualify for SSI benefits, and who would be stationed outside the United States accompanied by the disabled adult family member would be minuscule. However, the importance of SSI benefits to the economic well being of the family is no less for these military members than those with disabled children.

DISCUSSION

NCOA is grateful that this subcommittee would consider, as part of its SSI deliberations, rectifying many of the inequities military families have had to endure. Nonetheless, this Association continues to be amazed that our government would ever penalize military families simply because they were following orders! As the military services are drawn down in numbers, the abilities and skills of each military member becomes even more vitally important. This Country cannot afford to lose for a day or a week or a month a member who is critical to the mission of his/her unit. We also do not believe the citizens of this Country expect military families to be excluded from the benefits of such programs as SSI simply because the services of the military member are needed at a duty station outside the United States.

RECOMMENDATION

NCOA respectfully recommends that as the SSI Program is restructured by this subcommittee that the current inequities in law be changed to allow military families with a family member who is born or becomes disabled while in the overseas area and adult disabled dependent family members to qualify for SSI benefits when stationed outside the United States with their military sponsor.

Thank You.

TESTIMONY OF
THE HONORABLE OWEN PICKETT
BEFORE THE
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON SOCIAL SECURITY
APRIL 14, 1994

Mr. Chairman, I would like to commend you and your subcommittee for holding this hearing and thank you for the opportunity to testify on the Social Security Disability Process Redesign proposal.

I communicated with the subcommittee in December of 1993, regarding the large number of social security disability cases in my district, the Second District of Virginia, being appealed to Administrative Law Judges (ALJs). The appeals appear to arise because the local Social Security offices are being required to strictly follow inflexible guidelines set by the regional office in Baltimore. As a result, there is an initial denial of benefits in almost every case. On appeal, there is a finding in favor of the claimant in about eighty percent of the cases. Clearly, something is wrong.

Current practice does not make available to Social Security disability determination workers the judicial precedents set in cases decided by the ALJs. Were these decisions communicated to the local offices, perhaps fewer cases would be denied and result in appeal. It now requires some 155 days from a claimant's first contact with the Social Security Administration (SSA) until receiving an initial claim decision notice, even though the actual task time to reach this initial decision is only 13 hours.

The introduction to "Disability Process Redesign: The Proposal and Background Report from the SSA Disability Process Reengineering Team" states that, "Anywhere from 16 to 26 employees will handle the [disability] claim before the initial decision is reached." (p. 1) The reengineering of this process is long overdue. Passing the workload to the ALJs does not serve the interests of anyone.

I am encouraged by several components of the Redesign proposal that I believe could alleviate some of the problems in the current disability claims process.

Claimants are certain to feel they are getting more personal service as a result of interacting with only one SSA employee, a disability claims manager, throughout the claim intake and adjudication process. Empowering disability claims managers with more authority should result in more efficient and prompt service to claimants if, as stated in the proposal, these employees receive proper training and are "knowledgeable about the medical and nonmedical factors of entitlement." (p. 24) Under the proposal, 7 to 8 SSA employees will have handled each claimants case at the point an initial decision is issued--a vast improvement from the current 16 to 26 employees.

The creation of a new position of adjudication officer at the appeal level should improve the process. This officer would oversee the pre-hearing management of the appeal and have the authority to revise an initial denial when warranted by new evidence. This should improve the hearing process and speed decisions, thus reducing the caseload of ALJs and relieving them of the day to day responsibility for overseeing prehearing matters. It would be a natural development for judicial precedent to play a larger role in the decision making process of the adjudication officer. ALJs would not be put in the position of, in essence, retrying 'the same case' day in and day out.

Perhaps the most encouraging component of the Redesign proposal is a new commitment on the part of the SSA to quality assurance. "SSA will be accountable to the public, the ultimate judge of the quality of SSA service, and SSA will strive to consistently meet or exceed the public's expectations." (p. 56) It is my hope that this component of the proposal will be given the utmost attention by SSA and not be allowed to fall by the wayside.

I would like to commend the Social Security Administration, and especially Dr. Shirley Chater, Commissioner of Social Security, and Ms. Rhoda Davis, Chair of the Disability Process Reengineering Team, for undertaking the monumental task of redesigning the Social Security Disability Determination process. I support the effort made by the Reengineering Team and hope that the changes they have proposed will improve service to beneficiaries and relieve some of the burden currently placed on Administrative Law Judges.

SSA-Disability Reengineering Project
P.O. Box 17052
Baltimore, MD 21235

Dear Sirs:

I am writing this letter to comment on the Social Security disability reengineering proposal recently submitted by the Social Security Administration. I am a Disability Adjudicator, and have been one for ten years. I work at a state Disability Determination Service, and am involved in making medical determinations of disability on SSA and SSI disability claims. While the intent of this proposal is commendable, it seems to include many questionable policies that, if put into practice, will have an extremely adverse effect on the viability of the disability program. It is my hope in this letter to address some of these policies, and to offer ideas of streamlining possibilities that would be more effective in providing deserving claimants with quality decisions on a more timely basis.

I like what I do because it involves helping people. As an adjudicator, it is my concern that claimants receive a fair decision in a timely manner. As a taxpayer, it is my concern that this process is conducted in a cost-efficient manner.

I'd like to comment on to several areas of this proposal that concern me. Except for treatment, the purpose of the disability program is the same as any doctor's office or HMO - to provide a quality professional assessment of a claimant's/patient's condition in the most efficient, cost-effective manner possible.

Doctor's Office/HMO Procedures vs. Re-engineering Procedures

Under the reengineering proposal, one person would be required to interview claimants (twice for denials), take applications, explain the entire program, request medical evidence, request consultative exams, evaluate the claim or have it evaluated by a doctor, and formulate the decision. It also appears that this person, in order to explain the program to the claimant, would have to have knowledge of work issues, income and resource issues and benefit payments.

Doctors' offices and HMOs are not operated in this fashion. They have been using the same procedures to see and evaluate patients for years. Since they are in business to make a profit, if there were a more efficient, cost-effective way to provide this service, they would be using it now, but that has not happened. A receptionist and/or clerical worker helps patients with paperwork, explains office procedures, schedules appointments, and handles bills and payments. A doctor, nurse or physician's assistant sees the patient and evaluates the patient's condition. Additional appointments are made for treatment, not to refute the

assessment of the patient's condition. If the patient does not agree with the medical assessment of his or her condition, he or she is free to seek another medical opinion.

If a doctor, nurse or P.A. had to do the work of the office staff or schedule appointments for patients to refute their findings, how many patients would be seen and evaluated in comparison to current procedures? Would the patients' treatment be any better because the doctor, nurse or P.A. got involved at all levels of the process? Would this process be more cost-effective? Would this process result in more timely service or in longer delays for patients to be seen? How many additional doctors, nurses and P.A.s would an HMO have to hire to expedite these new procedures?

A similar comparison can be made in the business world. Production jobs are kept separate from other business functions. People working on an auto assembly line are not expected to take customers for a test drive, explain car features, and draw up payment contracts. If they were, how many cars would be built? Would the quality of the cars being built be any better? Would this system be cost-efficient? Would this process be time-efficient?

The conclusion to be drawn from these two examples seems evident. It is practical to expect broad responsibility in a limited area. It is also practical to expect narrow responsibility in a broad area. However, it is not practical to expect broad responsibility in a broad area. This is in direct conflict with page 14 of the E-mail reengineering overview, Teamwork and Workforce Enrichment section which states: "Employees . . . will perform multiple tasks instead of narrow activities, expanding their roles to encompass more of the "whole" job, and enabling them to experience the direct relationship between their actions and the final product."

The Disability Claim Manager

The disability claim manager is defined in this proposal as "a front-line employee knowledgeable about the medical and nonmedical factors of entitlement." The vast array of job duties that this reengineering proposal assigns to this position is simply too broad. No one person could possibly have the knowledge or the time to perform all of the aspects of this job description in an appropriate manner.

The Social Security disability program involves SSA (Title II) and SSI (Title XVI) claims. Under SSA, there are DIB, DWB, CDB and Medicare Only claims. Under SSI, there are DI, DS, and Zebley DC claims. There are blindness claims under each title. Currently, there is a reconsideration step for each of these claim types (the new proposal seems to replace the reconsideration step with an adjudication officer pre-ALJ step).

Each of these claim types also involves a CDR process when appropriate (CDRs are not even addressed in the reengineering proposal, but are an important part of the adjudicative process. It seems that they should be included.). In addition, there are issues involving unfavorable onset, date last insured in the past, collateral estoppel, closed periods, reopening previous decisions and others that each requires different procedures in processing the disability decision.

Medical evaluation training and training involving these various types of claims for adjudicators are combinations of formal and consultative training that takes a few years to master. In addition, medical evaluation procedures and case development procedures are frequently changing. The DDS POMs manual that covers these areas is 14 inches thick.

The reengineering proposal adds knowledge of Social Security field office procedures, work evaluation procedures and benefits to what is already required. Interviewing claimants, explaining the disability program to claimants, predental interviews and follow-up, assisting claimants with appeals, and working with the adjudication officer are also added to the list.

Presently, Social Security field offices have certain people taking applications for Title II claims, and others taking Title XVI applications in most cases. How thick must their procedures manual be? The new proposal seems to combine these functions.

Is it reasonable to expect one person to acquire all this knowledge and perform all these duties? How would the massive amount of training required to expose people to all of this information be accomplished? Caseload sizes, which have run a high as the 200s in the last six years, would have to be cut drastically. Case processing quotas, which have increased by as much as 10,000 cases a year in recent years to a level that puts tremendous stress on the quality/quantity balance of determinations, would have to be cut drastically. How many additional people would have to be hired? In an era of cost cutting, this would be a fiscal nightmare.

Functional Assessments

Under the current system, objective medical evidence is evaluated to arrive at an objective disability decision. Subjective statements like "this patient is totally and permanently disabled" are considered, but the final decision is based on objective medical findings.

Under the reengineering proposal, functional assessments from treating sources, other nonmedical sources and claimants would have a significant role in the disability determination. This introduces a subjective element into the process that can open

the door to a great deal of abuse and fraud.

In a number of cases, it would be in a doctor's self-interest to describe a patient as functionally disabled. Consider the doctor who has had a long relationship with a patient or treats relatives. He or she will not want to be put in the position of being responsible for that patient's denial. Consider the doctor whose patient owes him money for unpaid bills. If he or she describes the patient as functionally disabled and the claimant gets benefits, the doctor could get some reimbursement from the government with Medicaid benefits.

Conversely, it is difficult to get doctors to complete forms. They have their own patients to see and hectic schedules to keep up with. It's one thing to have a member of the office staff copy medical records, it's quite another to fill out forms themselves.

Thus, it is faulty to assume that functional information, subjective in nature, can be measured "as objectively as possible." It is also optimistic to feel that "documenting functional ability will become the routine practice of physicians and other healthcare professionals."

The Predental Interview

There is an inherent conflict in combining interviewing and decision processing functions with regard to the predental interview. A claimant who has worked all of his or her life, paid into Social Security, and/or has an impairment and mounting unpaid bills to contend with will surely want to vent his or her frustration at the predental interview in most cases. While the claimant cannot be blamed for this reaction, and should be afforded the opportunity to do so, the disability claim manager is put in the position of participating in an interaction that is not constructive to the case and takes away from case development and processing time. How long should the claimant be allowed to vent his or her frustration? How can the claims manager conclude the interview without seeming insensitive? What happens in the case of a claimant who refuses to leave?

The predental interview also involves a possible threat to personal safety for the disability claim manager. Claimants who come to this interview are people under stress. Some have mental impairments. Some are alcoholics or drug abusers. Some have recently been released from jail. Most are under the stress of mounting unpaid bills. It is impossible to gauge with any consistent degree of certainty how violent their reaction to this procedure will be. Unfortunately, we live in a violent society. How will this potentially volatile situation be addressed, and at what additional cost for enhanced security?

The predenial interview also has the potential of creating excessive processing time delays and additional case processing costs. It appears that the claimant can cite additional treating sources that must be contacted before a final decision is made. What about a claimant who states that he or she has another appointment in the next week or two? Must the case be held open, the claimant be contacted to see if the appointment was kept, the additional evidence be requested and thirty days be given for a response? That could add as much as two additional months to the case processing time. Suppose that claimant adds additional allegations not covered by the evidence in the file during the predenial interview. A consultative exam might then have to be purchased requiring both additional case processing time and cost. Would another predenial interview then be required?

Adjudication Officer/ ALJ

The reengineering proposal appears to find time for its procedures in two main areas: the paperless office, and the elimination of the reconsideration process. The paperless office seems to be at least a few years away. The reconsideration seems to be replaced by the function of the adjudication officer.

Under this proposal, the adjudication officer would prepare claims for the ALJ hearing with authority to "allow the claim at any point prior to the hearing that sufficient evidence becomes available to support a favorable decision." These functions are the same as those of the reconsideration adjudicator, with the exception of referring cases that could not be allowed by the adjudication officer to the ALJ. Additional duties of the adjudication officer include explaining the hearing process to the claimant, conducting personal conferences, and scheduling hearings.

The ALJs are currently two years behind in hearing disability cases. If the reengineering proposal succeeds in getting cases to the ALJ level more quickly, the backlog at this level be increased dramatically. Many additional ALJs are needed to deal with the current backlog. Many more will be needed under the reengineering proposal.

The Current System vs. Reengineering

Publications on reengineering continue to indicate that the current system is broken. The fact is that the current system is not broken, it is overloaded. Any system will not function properly if overloaded. A 4-cylinder car will not pull a big travel trailer. The engine is not broken, the load is just too heavy. Replacing this car with a 6- or 8-cylinder model that is more costly to maintain and may have major mechanical problems does not seem to be a reasonable alternative.

It seems that this reengineering proposal raises many more questions than it answers. It is curious that there were no adjudicators on the reengineering committee. A doctor and an administrator represented DDSs. Neither of these people would have current experience in case development or decision processing. It is also curious that this proposal has been compiled in such a short time. This is a huge undertaking, and should not be regarded lightly. If the result of this effort falls short of its intent, the immediate victims, in terms of increased processing time, will be the people in most need, the disabled.

Suggestions for Streamlining

Many of the slowdowns in case processing can be attributed to procedural policies and court decisions. The following suggestions are made for consideration in streamlining case processing time:

- 1. Make immediate decisions on obviously frivolous claims.** This could be done at the Social Security field office by current case representatives. A reference list of impairments (pregnancy, fractures, etc.) could be compiled. A standardized denial notice with a space for typing in impairments could be formulated. The claimant would also be advised about what actions to take if the impairment became worse or did not improve as expected.
- 2. Give adjudicators more leeway in determining disability.** There are some claims that do not result in allowances under current methodology. However, the claimants are so restricted that the adjudicator feels the claim will be allowed by the ALJ. By granting the adjudicator some latitude, these cases could be allowed at the initial level.
- 3. Waive the 30-day rule for receipt of medical evidence of record.** There are many denial claims in which the most current and relevant medical evidence of record comes in first. The case must then be held for 30 days for any additional MER to be received. This costs significant processing time. Waiver of this rule would result in faster case processing.
- 4. Require attorneys and third party groups representing claimants to submit all MER with the application.** Many cases could be evaluated immediately upon arrival at the DDS or CEs could be scheduled immediately if this procedure were adopted. Waiting time for MER would be eliminated in these cases, and quicker processing time would result.
- 5. Clearly defining Social Security rules and regulations.** The biggest detriment to processing time in the past three

years has come from the Zebley court decision. Many Zebley children's cases from as far back as 1980 had to be evaluated as many as three times. This was in addition to the increased current case receipts. It should be a priority that a situation like this does not happen again. This is a further indication that the current system is not broken, just overloaded.

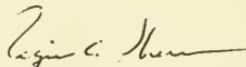
6. Tie the medical improvement standard for CDR claims to objective medical evidence. At present, if an ALJ allows a claimant inappropriately on other than objective medical evidence, there is no way to show medical improvement in most cases, and the claimant continues to draw benefits inappropriately. These cases will continue to come up for review with little hope of cessation. This wastes processing time and taxpayers' money on a claim that should be ceased. Again, CDRs were not addressed in the re engineering proposal, but are an important part of case processing that cannot be separated from other decisional procedures.

The Ultimate Customer

The reengineering proposal emphasizes "world-class customer service." Yet, the ultimate customer of government is the taxpayer. No one is opposed to changes that would provide world-class customer service to the claimants and taxpayers alike. However, no feasibility study or cost analysis has been done on this proposal. The proposal raises many unanswered questions. As stated previously, if the result of this reengineering proposal falls short of its intent, the immediate victim will be the disabled claimant, but the ultimate victim, in terms of increased overhead and benefits cost, will be the taxpayer.

Please consider the questions raised and the suggestions given in this letter. It is my hope that much thought and careful consideration given to the issues raised in this letter and others like it will result in a better system for both claimants and taxpayers.

Sincerely,



Regis C. Sherer

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Janice Mays
Chief Counsel & Staff Director
Committee on Ways & Means
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Washington, D.C. 20515

COUNSELING OFFICES
1011 LAKE STREET
SUITE 412

May 11, 1994

RE: Redesigned Disability Claims Process Proposal

Dear Ms. Mays,

It has recently come to my attention that the House Ways and Means Committee is reviewing a proposal to fundamentally change the way Social Security Disability claims are processed and adjudicated.

I am writing to comment on the information that I have obtained regarding that proposal. I particularly refer to a question and answer document that was circulated last week by the "Disability Reengineering Team." In this document, it is stated that "more work needs to be done before the effect on an individual can be determined." I certainly agree with that statement. The intent of the proposed is apparently to "streamline" the methodology used in making disability decisions. It appears that this streamlining will surely be at the expense reliable information that is now available to Judges through the expertise of Vocational Experts.

I have served as a Vocational Expert since 1983 and have attended thousands of disability hearings. I am also Board Certified in Rehabilitation Counseling, Vocational Evaluation, and Insurance Rehabilitation and I have many years of experience in evaluating and counseling people with severe physical and mental impairments. I have worked closely with major corporations in placing my clients into competitive employment.

In my work as a vocational expert, I am called upon to assist the court in determining whether or not jobs exist in significant numbers, considering the claimants age, education, relevant work experience, and the occupational impact of impairments, based on hypothetical questions put to me by the court. To answer these questions, I bring in my knowledge of disabilities and also work demands of the real life labor market. My testimony provides details that are well beyond what is described in the Dictionary of Occupational Titles. I also factor in statistical data obtained from the Illinois Job Service and the U.S. Department of Labor in order to arrive at a figure representing the number of actual jobs that exist in the economy for each person described in the hypothetical profiles put to me at the hearings.

My general background and the service that I provide in the disability adjudication process is also shared by my colleagues in the Social Security Vocational Consultant Program.

I can not imagine how disability claims can be fairly and accurately evaluated without the use of seasoned vocational consultants such as I have just described. It is clear however, that the "Disability Reengineering Team" is proposing to eliminate the use of those services. I quote from the aforementioned Q & A document, item number 16, section on Disability Process Issues, "The testimony of Vocational Experts will no longer be required because SSA will no longer rely on medical/vocational guidelines and vocational expert testimony to identify whether work that the claimant can perform exists in the national economy."

It is my hope that you will closely scrutinize this proposal and the public repercussions that may be engendered by a poorly thought out reaction to Vice-President Gore's attempt to reengineer Government. I wish also to point out that, to my knowledge, no vocational experts were consulted when this proposal was put together, a dreadful oversight considering that the main thrust is to fairly determine employability in an even handed process that is fair to the claimant and to the taxpayer. Such a process must be based on the collection of data that can be relied upon as accurate through the use of experts in the field.

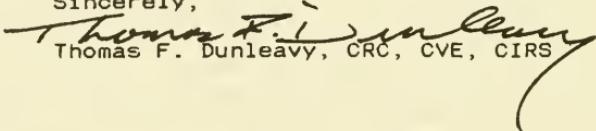
I wish to add that I believe the Administration would ultimately reduce expenditures by a large margin if a return to work/job development program were introduced that would include an incentive plan for recipients and employers. Most of the Vocational Experts who now testify at hearings are Board Certified Rehabilitation Counselors and posses the ideal skills to implement such a program.

Substantial cost savings would occur because recipients would not only be taken off of the disability roles, but they would also become tax payers instead of tax consumers. There have been studies done by Congress that have demonstrated the return for rehabilitation is \$8.00 to \$12.00 for every tax dollar invested. The details of these studies can be obtained through the National Rehabilitation Counseling Association, Government Affairs Committee, 703/361-2077.

I have been advised to include 8 copies of this letter that you find attached.

Thank you for taking the time to consider these comments. If I can be of any help in the future, please feel free to call.

Sincerely,


Thomas F. Dunleavy, CRC, CVE, CIRS



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April 25, 1994

Ms. Janice Mays
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 Committee on Ways and Means
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 1102 Longworth House Office Building
 Washington, D. C. 20515

Re: Proposed Reengineering/
 SSA Disability Process

Dear Ms. Mays:

I am a private practitioner specializing in the field of social security disability. I have concentrated in this area for more than fifteen years and have recently completed my tenure as president of the New York Social Security Bar Association. After reviewing the proposed restructuring of the social security disability system, I have been advised to submit my comments regarding same to the Committee.

I have several reservations concerning the feasibility of the proposed changes. My greatest concern is the restricted time period for submission of medical evidence of disability at the initial application level. Even where a disability applicant has retained counsel for submission of the application, it is unrealistic to expect the claimant's physicians to respond within a forty day period to requests for medical information. It is even more unlikely for an unrepresented claimant to be able to request and obtain necessary proof of disability within such a short period of time. Without the supporting medical data, an adverse decision will be made by a claims manager in many cases where the claim could have been approved at the initial level had the appropriate medical information been adduced. It would therefore seem apparent, that many more cases will proceed to the already overburdened hearing offices, where further delays will ensue.

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I am further troubled by the language in the proposal regarding the definition of disability. Although it is clearly stated that the definition of disability will remain the same, the present concept of disability including the Listings and Grids, has been radically altered. Further, the doctrine of medical equivalence has been deleted. In their place, the proposal sets forth a new "index" standard, with different age criteria. This in effect, does indeed change and replace the current definition of medical disability. These proposed changes further constrict a claimant's right to disability benefits.

Lastly, the creation of the claims manager and adjudication officer, in an attempt to speed up and streamline the disability process, may in fact add new levels of bureaucracy well beyond those present in the current system. These two new decision makers are given broad powers without defining the training and background necessary for proper adjudication of a disability claim. Administrative Law Judges are attorneys with several years trial experience. They should retain their current judicial authority. The claims manager in having ultimate authority to grant or reject a case, does not have the training or background to properly adjudicate these claims. The adjudication officer, although having only authority to grant a claim, would in effect create another level of adjudication. The present reconsideration level would therefore be replaced by the adjudication officer level. Again, the proposal is vague at best, in describing the background and training needed for this position. The present system contains a procedure for pre-hearing conferences with staff attorneys. This works very well in reducing the number of claims which must go to de novo hearing before an Administrative Law Judge. The staff attorneys are legal experts, well-trained to handle the complex issues that arise within the framework of a disability case. Adjudication officers are not needed, as there is already in place a system which works well to properly and fairly pre-adjudicate favorable claims. The pre-hearing conference system is also safeguarded, in that stipulations between claimant's representatives and staff attorneys, must be ultimately approved by an Administrative Law Judge.



It is my position as well, that the Appeals Council should be retained, to avoid overburdening the Federal Courts with disability appeals.

In conclusion, the disability system was initially enacted as a remedial program to benefit disabled claimants. The reengineering proposal, in its efforts to streamline and facilitate claims, would have the opposite effect of creating further bureaucracy, longer delays, and additional restrictions on a claimant's rights to disability benefits.

Thank you for taking the time to review my comments concerning this proposal.

Respectfully submitted,

Barbara Dobrin Tilker
Barbara Dobrin Tilker

BDT/bt
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May 17, 1994

Janice Mays
Chief Counsel and
Staff Directorate
1102 Longworth HOB
Washington, DC 20515

Dear Ms. Mays:

I have just reviewed the Re-Engineering Report for the Social Security Administration suggesting many changes in both the evaluation of disability as well as the process for initial claims and appeals. The report suggests that the Social Security Administration will develop standardized criteria which can be used to measure an individual's functional ability. Your report further notes that functional assessment instruments will be designed to measure, as objectively as possible, an individual's ability to perform a baseline of occupational demands that includes the principle dimensions of work and task performance, including primary physical, neurophysical, psychological, and cognitive processes. The use of standardized criteria and a baseline of occupational demands suggests that vocational expert testimony will no longer be a part of the hearing process.

The development of the above noted standardized criteria and baseline occupational demands suggest that all individual differences can be accounted for within this classification scheme. This, although theoretically possible, is from a practical applied perspective unrealistic. The hearing process would be in fact further impaired by the elimination of expert vocational testimony that takes into account individual differences in workers and their environments. In sum, this may serve to impair the hearing process and claimant's right to a fair hearing. Vocational expert testimony is a necessary component in making a fair objective assessment of the claimant's ability to perform substantial gainful activity. I would appreciate your making an effort to continue this fair existing unbiased process.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Bruce Walsh".

W. Bruce Walsh, Ph.D.
Professor of Psychology

WBW:lh



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